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ALEXANDER L. STEVAS,
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JONATHAN L. HAAS,
Petitioner,
v.
EDGAR HASH and ELAINE HASH,
Respondents.

Petition for a Writ of Certiorari
to the Court of Appeals of Arizona

Jonathan L. Haas
In Propria Persona
P.O.Box 7461
Phoenix, Arizona 85011
602-277-6001

Volume 1 of 2

QUESTION PRESENTED

Whether the Arizona Court of Appeals denied the Petitioner the due process of law when it

1. Failed to hold that the Corrected Corrected Judgment in the underlying Malicious Action, Cause C-349188, Superior Court of Maricopa County, State of Arizona, was procured by collateral fraud, and did not avail Defendants Hash a complete defense in an action for malicious prosecution;

2. Affirmed the trial court's requirement that the underlying malicious action, Cause C-349188, must terminate by a "favorable termination" rather than a "final termination".

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceedings below:

Jonathan L. Haas

Edgar Hash

Elaine Hash

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v.

EDGAR HASH and ELAINE HASH
Respondents.

Petition For A Writ Of Certiorari
To The Court Of Appeals Of Arizona

Petitioner, Jonathan L. Haas, prays that
a Writ of Certiorari issue to review the
judgment of the Court of Appeals of the State
of Arizona entered in this matter on July 27,
1982.

OPINION BELOW

The Opinion of the Court of Appeals of
the State of Arizona, and the judgment of the
Superior Court of the State of Arizona in and

for the County of Maricopa are reproduced in the Appendix.

JURISDICTION

The Arizona Court of Appeals entered its Memorandum Opinion on July 27, 1982. (App.1a-11a). The Arizona Court of Appeals denied Petitioner's timely Motion for Rehearing on September 1, 1982. (App.17a). The Arizona Supreme Court denied Petitioner's timely Petition for Review on September 28, 1982. (App.19a). On October 6, 1982, the Court of Appeals issued its Mandate to the Superior Court for action consistent with the Court's Opinion. (App.40a). A Judgment pursuant to the October 6 Mandate was entered by the Superior Court on October 14, 1982. (App.42a-44a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

Amendment XIV of the Constitution of the United States of America:

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Jonathan L. Haas, has been denied a full and fair hearing in a malicious prosecution action against Respondents Edgar Hash and Elaine Hash, his wife.¹

Background

In 1974 Wanda Yates, Executrix of the Estate of Flora Holman (YATES), employed Ed Post Realty, an Arizona real estate company, to sell a delapidated old house located at 2226 North Dayton, Phoenix, Arizona.²

Petitioner, Jonathan L. Haas (HAAS), a licensed real estate salesman employed by Ed Thirkhill Realty, an Arizona real estate

1. Elaine Hash is a party to this action only due to Arizona community property law.

2. The legal description is Lot 11, Block 1, PHOENCIA, Maricopa County.

company, procured an offer from State Investment Corporation (STATE) to purchase the property. The purchase price was \$12,500; down payment of \$1,500; and deferred balance of \$11,000 to be evidenced by an agreement for sale assignment.

This offer to purchase (App.45a-53a) was forwarded to Ed Post Realty by HAAS.³ The offer was delivered by Ed Post Realty to Edgar Hash's office. This offer to purchase the property was accepted by Edgar Hash (HASH) as attorney for YATES on November 20, 1974.

YATES did not sign the purchase contract and did not see it until after the Probate Court approval of the sale. HASH, as attorney for YATES, handled the acceptance of the purchase contract and Probate Court approval of the sale for YATES.

Pursuant to the purchase contract and upon advice of her attorney HASH, YATES executed a

3. The custom in the real estate trade in Arizona is for the selling broker (Ed Thirkill Realty) to deal only with the listing broker (Ed Post Realty), and the listing broker to deal directly with his client, the seller of the property.

warranty deed, dated November 22, 1974, notarized December 17, 1974, and recorded December 23, 1974.

At the time of closing of the escrow on this property STATE assigned a collection account at The Title Insurance Company of Minnesota and did not assign any real property interest to YATES as security. HASH became aware of this after close of escrow and conveyance of title to the property to the buyer, STATE. To remedy this situation HASH entered into negotiations with R. Richard Rowe, President of STATE (ROWE) to acquire some real property interest as security for his client, YATES.

HASH tried to safeguard his client's interest by obtaining an actual assignment of a realty mortgage as security for the deferred balance. HASH and ROWE created a realty mortgage⁴ and assignment, a mortgage which

4. ROWE, personally, was mortgagor and ROWE, as President of State Investment Corporation, was the mortgagee.

both HASH and ROWE knew was in second position. (App.54a-61a & 62a-64a). HASH did not request a title search on the mortgaged property nor did he obtain title insurance⁵ to insure the mortgage was in first position to further protect his client, as he already knew that it was in second position.

Although dated prior to the date of closing of the escrow, the mortgage and assignment were not drawn until after the close of escrow at the request of HASH. The mortgage was executed by ROWE as mortgagor to STATE as mortgagee and recorded on January 30, 1975. The assignment instrument, prepared by HASH and dated December 20, 1974, refers to the realty mortgage recorded January 30, 1975.

In April, 1977, American Savings Life Insurance Company, the mortgagee in first position on the property filed a foreclosure action (Cause C-349188, Superior Court of Maricopa County, State of Arizona) naming

5. Arizona is a title insurance state and is not an abstract state.

YATES, among others, as defendants.

On September 19, 1977, YATES filed a Third Party Complaint against HAAS. The Complaint was prepared and signed by HASH, attorney for YATES. Specifically, the Third Party Complaint alleged:

"...that said mortgage which was assigned was fraudulently represented by the Third Party Defendant HAAS...to the Third Party Plaintiff YATES as a valuable first mortgage equivalent to the property sold to STATE INVESTMENT CORPORATION by the Third Party Plaintiff YATES in probate sale."

The Third Party Complaint further alleged:

"That the Defendant Haas...knew that said representations were false and intended that they be acted upon by the Defendant YATES as reasonably contemplated...The Defendant YATES relied on such representations...and that she had a right to rely thereon and did so to her damage..."

The allegations in the Third Party Complaint relate to the mortgage and assignment of mortgage, which mortgage was recorded on January 30, 1975. Even though the assignment is dated December 20, 1974, it is impossible for it to have existed prior to January 30, 1975, because it refers to the

mortgage by docket and page number, as well as recording date (January 30, 1975). The mortgage also did not exist prior to the close of escrow⁶ on the property. This is confirmed by both HASH and ROWE in their depositions.

Therefore when HASH and YATES alleged in the Third Party Complaint that HAAS misrepresented the mortgage and assignment to YATES prior to acceptance of the offer to purchase the property (November 20, 1974) they well knew that the allegations were false, because these instruments had not yet been created by HASH and ROWE. The Third Party Complaint was signed by HASH, not YATES. HASH knew the allegations were false.

YATES never met, talked to, communicated with, contacted, employed, contracted with or

6. In Arizona it is customary for the grantor to deposit all instruments required to convey title to real property with an escrow agent, usually a title insurance company. When the conveyance is subject to conditions and the instruments are in possession of the third party this is called an escrow. Upon delivery to the grantee by the depository the instruments take effect.

relied upon HAAS in regard to the sale of the property. This is confirmed in the interrogatories of YATES. HASH, as attorney for YATES, handled all matters, documents and instruments relating to the sale of the property, and YATES relied on her attorney, HASH, her real estate broker, Ed Post Realty, and her salesman, Ron Stacey, all of which is confirmed in the interrogatories of YATES.

A Motion for Summary Judgment was made by HAAS in the Third Party Complaint praying that:

"...summary judgment be entered against Third Party Plaintiff dismissing this action against Third Party Defendants...Haas and awarding court costs and attorneys fees to Third Party Defendant, Haas."

Oral argument on this Motion for Summary Judgment was set for November 16, 1979.

On November 14, 1979, HASH as attorney for YATES, contacted David Postal, attorney for HAAS, and offered not to oppose the Motion for Summary Judgment if HAAS agreed to waive legal fees. It was so stipulated and there was no oral argument on HAAS's Motion for Summary

Judgment. On November 16, 1979, the Honorable Stanley Goodfarb, Judge of the Superior Court, entered a minute entry of summary judgment in favor of HAAS (App.65a), stating in part:

"IT IS ORDERED, granting Summary Judgment in favor of the Defendants, Jonathan L. Haas and Hiroe Haas in the sum of \$65.00. Counsel for defendant Haas shall prepare a Judgment and submit same to the Court for signature."

The formal Summary Judgment in the Third Party Complaint was lodged with the Court on December 1, 1979; a copy being mailed to HASH and the Court. (App.67a-69a). On January 8, 1980, the Court signed the formal Summary Judgment. (App.69a). This Judgment stated in part:

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Third Party Defendants, HAAS' Motion for Summary Judgment is granted and that Third Party Plaintiff's action against Third Party Defendant, JONATHAN L. HAAS and HIROE HAAS is dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Third Party Defendants have judgment in the sum of \$65.00 as and for costs, with interest thereon at the rate of 6% per annum from doid(sic) until paid."

Proceedings in the Trial Court

On January 11, 1980, this malicious prosecution action was filed. (Cause C-402225, Superior Court of Maricopa County, State of Arizona). On February 5, 1980, over two months after the formal Summary Judgment was lodged with the Court, HASH challenged the Summary Judgment, signed January 9, 1980, in the Third Party Complaint (Cause C-349188) by submitting a Motion to Correct Judgment and Notice. (App. 72a-76a). It stated in part:

"Contrary to the minute entry, defendant and counsel prepared a more formal form of judgment which seemed to imply that the court was considering the merits of the case after argument. The only relief granted was for judgment for the defendant and costs, all pursuant to a stipulation as set out in the minute entry...The differences were not noticed until after Defendant Haas filed a complaint for malicious prosecution against Third Party Plaintiff's counsel two days following the entry of judgment."

This Motion to Correct Judgment was opposed unsuccessfully by HAAS (App.77a-80a) and a Corrected Judgment was lodged with the Court by HASH as counsel for YATES on March 20, 1980, pursuant to the minute entry of

March 3, 1980.⁷ (App.83a-85a). The Corrected Judgment (App.86a-89a) read in pertinent part:

"There was a stipulation by counsel for the granting of the summary judgment upon the payment of costs of \$65.00 and that there was no determination of the motion on the merits, and the stipulation indicated that such was not to be done...

It further appears that this determination now has been utilized by the Defendant Haas as the basis for a malicious prosecution action."

The Corrected Judgment then grants the same relief as the Summary Judgment signed by the Court on January 9, 1980:

"IT IS FURTHER ORDERED, in conformity with said stipulation and agreement of counsel, that the Defendants, Jonathan L. Haas and Hiroe Haas have judgment against the Personal Representative of the Estate of Flora Holman, Deceased, in the sum of \$65.00 as and for court costs."

HAAS objected to the form of this Corrected Judgment (App.90a-92a) and the Court

7. The minute entry of November 16, 1979(App.65a-66a) states that "...no one will appear..." for oral argument and the minute entry of March 3, 1980(App.83a-85a) states "...and having reflected upon its own recollection of the hearing on the motion for summary judgment...". There appears to be some question of the memory of the trial court.

struck some of the more obnoxious language by minute entry of April 14, 1980. (App.93a-94a). So the adjudication of Cause C-349188 Third Party Complaint was a Corrected Corrected Judgment granting HAAS the relief prayed for in his Motion for Summary Judgment, except legal fees. (App.95a-98a).

On this same day, April 14, 1980, HASH filed a Motion for Summary Judgment alleging that the prior action Cause C-349188) was not terminated favorable to HAAS.

On May 5, 1980, HAAS filed a Response to HASH's Motion for Summary Judgment and a cross Motion for Summary Judgment. In this Response to HASH's Motion for Summary Judgment HAAS first raised the question of collateral fraud by HASH in obtaining the Corrected Corrected Judgment in the underlying malicious action (Cause C-349188). In this cross Motion for Summary Judgment HAAS first raised the question of "final termination" verses "favorable termination". These questions were

directly raised before the trial court, which chose to ignore the question of collateral fraud and determined that a "favorable termination" was an essential element in an action for malicious prosecution.

The trial court by minute entry granted Summary Judgment in favor of HASH on June 3, 1980, stating that the prior proceedings (Cause C-349188) were not terminated favorable to HAAS. (App.12a-16a).

Proceedings in the Appellate Courts

HAAS made a timely appeal to the Arizona Court of Appeals raising the following issues:

1. Whether a Judgment Resulting From a Stipulation to a Summary Judgment in a Civil Matter Constitutes a Favorable Termination of Litigation as a Basis for a Malicious Prosecution Suit.

2. Whether There Are Any Genuine Issues of Material Fact Which Preclude Granting the Summary Judgment of Plaintiff Haas Against Defendant Hash.

On October 14, 1980, HAAS filed his Opening Brief which raised the questions relating to the Corrected Judgment and the "favorable termination". The Arizona Court of Appeals on July 27, 1982, entered a Memorandum Decision affirming the Judgment of the trial court. (App.1a-11a). On August 11, 1982, HAAS filed a timely Motion for Rehearing (App.21a-37a) and on September 13, 1982, HAAS filed a Petition for Review with the Arizona Supreme Court (App.38a-39a), both of which were denied.(App.17a-18a & 19a-20a).

The Arizona Court of Appeals addressed only the issue of "favorable termination".

REASONS FOR GRANTING THE WRIT

The Arizona Court of Appeals' decision denied HAAS of due process of law. Their holding that the procedural requirement of a "favorable termination" rather than a "final termination" should not be allowed to interfere with HAAS's right to substantive due process. The holding by the Arizona Court of Appeals that any civil action terminated pursuant to negotiations, agreement and stipulation, even to such collateral matters as attorney fees, which have no relation to the merits of the case, does not constitute a favorable termination as is necessary for maintenance of an action for malicious prosecution deprives the victum/defendant in a malicious and unfounded civil action of any recourse unless he is able to protract the judicial process to a full hearing on the merits. This requirement of protracted litigation resulting in a decision on the merits raises substantial questions of due process requiring plenary consideration.

The refusal by the trial court and the Court of Appeals to recognize that the malicious and unfounded civil action complained of (Cause C-349188) was an out and out fraud and that the Corrected Judgment in Cause C-349188 was procured by collateral fraud is a travesty of justice and must be reformed.

- I. The Arizona Court of Appeals Violated Due Process by Not Ruling that the Corrected Judgment in the Underlying Malicious Action, Cause C-349188, Was Procured by Collateral Fraud, and Did Not Avail HASH of a Complete Defense in an Action for Malicious Prosecution.

Collateral Fraud justifying equitable relief against a judgment or decree means some intentional act or conduct by which the prevailing party has prevented the unsuccessful party from having a fair submission of the controversy. Black's Law Dictionary, Revised Fourth Edition, 1968, p. 789.

The Arizona Court of Appeals held:

"One of the essential elements of a claim for malicious prosecution is that the prior proceedings be terminated in favor of the

plaintiff in the malicious prosecution action. (citations omitted). If the plaintiff in an action for malicious prosecution fails to establish the essential element of a 'favorable termination' of the prior proceedings the defendant is entitled to judgment as a matter of law." (citations omitted). (App. 4a).

This holding is contrary to law. The law in this area was well settled by this Court in Crescent Live Stock Co. v. Butchers' Union, 120 U.S. 141 (1887):

"But the rule in question, which declares that the judgment or decree of a court having jurisdiction of the parties and of the subject-matter, in favor of the plaintiff, is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal, was not established out of any special regard to the person of the party. As we have already seen, it will avail him a complete defense in an action for a malicious prosecution, although it may appear that he brought his suit maliciously for the mere purpose of vexing, harrassing, and injuring his adversary. The rule is founded on deeper grounds of public policy in vindication of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law, and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them. The rule, therefore, has respect to the court and to its judgment, and not to the parties, and no misconduct or demerit on their part, except fraud in procuring the judgment itself, can be permitted to detract from its force. (Emphasis Added)

The Court must consider this argument in the light of the irrefutable facts as established by the purchase contract (App 45a-53a); the mortgage assignment (App. 62a-64a); and the dispositions of HASH and ROWE in the underlying action (Cause C-349188). Hash prepared and signed a Third Party Complaint alleging that HAAS fraudulently misrepresented a mortgage and assignment to HASH's client, YATES, to induce her to sign the escrow instructions. HASH did this, knowing full well tha the mortgage and assignment did not exist at the time of the signing of the escrow, because HASH had not yet created them. These documents were drawn by HASH and ROWE at the request of HASH more than a month after escrow had closed. HAAS had no knowledge of these instruments until several years later when the malicious action was filed.

On October 16, 1979, HAAS filed a Motion for Summary Judgment in the underlying action (Cause C-349188), and oral argument was sched-

uled. HASH, with over two years of discovery and not one shred of evidence to support his allegations, advised HAAS's counsel, David Postal, that he was not going to oppose HAAS' Motion for Summary Judgment. (See Affidavit of HASH, App.75a). HASH knew that opposing the Motion for Summary Judgment would be futile and tried to salvage paying legal fees, if he could. HASH did not offer to settle, negotiate or compromise the action. HASH admits in this affidavit that " Third Party Plaintiff Yates did not want to proceed with the litigation..." He only offered to throw in the towel if he could save his client from paying attorney's fees. If HASH thought his client had a meritorious action, why was he afraid of paying attorney's fees? Obviously he was of the opinion that his client's action was without merit.

The trial court granted HAAS's Motion for Summary Judgment in the underlying malicious action (C-349188) and on January 9, 1980 signed the formal Summary Judgment. There was

no oral argument on the Motion. (App.65a). There was no written stipulation. Copies of the formal Summary Judgment had been sent to the Clerk of the Court and to HASH. The original was sent to the Honorable Goodfarb. The trial judge and clerk received their copies, as is evidenced by their presence in the record. The Complaint in the action at bar (Cause C-402225) was filed on January 11, 1980, over five weeks after the formal Summary Judgment was lodged with the Court and a copy sent ot HASH.

It was well into February before HASH notified the trial cour that he did not receive a copy of the formal judgment. Although the record established HASH's lack of veracity, the trial court accepted HASH's story that he did not receive a copy of the formal judgment and that the Judgment was in error, while disregarding the testimony of David Postal, counsel for HAAS. (See Affidavit of Postal, App. 81a)

David Postal, counsel of HAAS was so

outraged by the conduct of HASH that he delivered a letter (App. 99a) to the Honorable Goodfarf, setting forth at least a prima facia case of collateral fraud. He stated in part:

"By June 1978, I had determined that Mr. Hash had in fact been the one who accepted the offer made, had later gone back and demanded, received, and prepared the instruments for additional security, all outside of the knowledge of my client the third party defendant.

Based on that knowledge I contacted Mr. Hash by telephone, and informed him that I believed his law suit was without basis, that I felt continuation of this matter would result in abuse of process, malicious prosecution action being brought against him, and with my client's permission offered to stipulate a settlement for a mutual stipulation to dismiss the action at that time, no further ramifications on either side.

Mr. Hash rejected out of hand this offer for a stipulated dismissal, and when it was determined the Mr. Rowe was seriously ill, a Notice of his deposition was taken in order to preserve his testimony. Mr. Hash attended the deposition of Mr. Rowe at which time a record pertaining to the transaction between Mr. Rowe and Mr. Hash was made, Mr. Rowe has subsequently died.

Motion for Summary Judgment in the Yates matter was made in October, 1979, the Court properly setting a hearing date.

At no time did I authorize a Stipulation of Dismissal in this matter, but did stipulate I would not go after attorney's fees and seek

only \$65.00 in costs, as my letter of November 13, 1979 to Edgar Hash (App.103a) relating to costs stated.

.....

It is my belief that the form of Summary Judgment entered was entirely proper, but that if the Court deems that on equity Mr. Hash has the right to set aside the judgment then it should be set aside and not changed." (emphasis added).

The Corrected Judgment (Cause C-349188) in the underlying malicious action was signed by the trial court judge on April 3, 1980, three months after the Complaint in the case at bar (Cause C-402225) was filed. This corrected Judgment (App.86a) contains the language, "...there was no determination of the motion of the merits, and the stipuation indicated that such was not to be done." The Justices of this Court should draw upon their vast years of experience on the bench and ask themselves if they have ever seen language like this in an honest and legitimate judgment.

The fact that the original formal judgment lodged with the Court reflected a deci-

sion on the merits establishes that HAAS did not negotiate a settlement of the action and that YATES, represented by HASH, was simply not opposing the Motion for Summary Judgment.

The additional language in the Corrected Judgment that, "this determination has now been utilized by the Defendants Haas as the basis for a malicious prosecution action." is quite unusual, to say the least. Could it be that the trial court judge was over protective of this erring attorney, and that his concern was reflected in the language of the Corrected Judgment?

II. The Arizona Court of Appeals Violated Due Process by Affirming that the Underlying Malicious Action Must Terminate by a "Favorable Termination" rather than a "Final termination".

The essential elements of the tort of malicious prosecution with an underlying criminal prosecution are : (1) a criminal prosecution, (2) that terminates in favor of plaintiff, (3) with defendants as prosecutors, (4)

actuated by malice, (5) without probable cause and (6) causing damages. Slade v. City of Phoenix, 112 Ariz. 298, 300, 541 P.2d 550 (1975); Cullison v. City of Peoria, 120 Ariz 165, 169, 584 P.2d 1156 (1978) and Bearup v. Bearup, 122 Ariz. 509 (App), 596 P.2d 35 (1979; See also Overson v. Lynch, 83 Ariz. 158, 317 P.2d 948 (1957)).

Arizona also recognized the tort with an underlying civil proceeding. See Bird v. Rothman, 128 Ariz. 599, 627 P.2d 1097 (App. 1981) cert. denied 102 S. Ct.; Carroll v. Kalor, 112 Ariz. 595, 545 P.2d 411 (1976) (App.

There is contention in the case at bar over the second element, that the underlying prosecution terminated in favor of HAAS. In the case at bar, Petitioner alleges that the Corrected Corrected Judgment (Cause C-349188) was a favorable termination. Respondent argues that the termination was in favor of HAAS, but was not a favorable termination for HAAS. It is undisputed that the underlying malicious

civil action (Cause -C-349188) has been legally terminated.

In considering this issue the Arizona Court of Appeals stated:

Whether a stipulated judgment in a civil proceeding may be deemed a 'favorable termination' for purposes of a subsequent malicious prosecution action has not been directly addressed in Arizona case law. Other jurisdictions, however, have held that where the prior proceedings terminated as a result of voluntary negotiation, settlement, or consent of the parties, there has been no such 'favorable termination'. (Citations omitted)

In discussing the "rationale for disallowing termination pursuant to settlement as a 'favorable termination'", the Arizona Court of Appeals dismisses the body and essence of Minasian in favor of a footnote:

"A dismissal resulting from negotiation, settlement or consent is generally not deemed a favorable termination of the proceedings. ...In such a case the dismissal reflects ambiguously on the merits of the action as it results from the joint action of the parties, thus leaving open the question of defendant's guilt or innocence." Minasian v. Sapse, 80 Cal.App3d 823, 827, 145 Cal. Rptr. 829, 832, n.4 (1978)

Although ignored by the Arizona Court of Appeals, the opinion of the Minasian Court, in the body of the opinion, which Petitioner

suggests reflects the intent of that Court,
states:

"... 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge.. against an innocent person. If the accused were actually convicted, the presumption of his guilt or of probable cause for the charge would be so strong as to render wholly improper any action against the instigator of the charge'.

Although the original proceedings in Jaffe was criminal, the gist of the statement is equally applicable to cases...where the main action is civil.

...
It is now the well-established rule that a verdict or final determination upon the merits of the malicious civil suit or criminal prosecution complained of is not necessary to maintenance of an action for malicious prosecution, but that it is sufficient to show that the former proceeding has been legally terminated.

...
Of course where the termination of the former proceeding is not on the merits it is somewhat more difficult to ascertain whether it indicated the innocence of the defendant in the action. Nevertheless, the theory is the same in testing a dismissal or other termination without a trial on the merits. 'If it is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination.'" Minasian v Sapse, App.145 Cal Rptr. 829,831 &832, 80 Cal.App.3d 823 (1978).

Based on these authorities it is respectfully submitted that the action was terminated in such a manner that it was favorable to HAAS.

The stipulation of HASH as attorney for YATES not to oppose the Motion for Summary Judgment is a confession that the Third Party Complaint was without merit.

The Arizona Court of Appeals, in echoing the argument of HASH, held that any negotiations between the parties creates an unfavorable termination, thus precluding a future malicious prosecution action by the defendant. To illustrate how ridiculous this argument is, if both attorneys agreed and stipulated that there should be no oral argument on the motion for summary judgment, and nothing else, then any judgment rendered by the court would be unfavorable to the defendant.

HAAS PRAYED FOR Judgment against YATES and was granted Judgment against Yates; the Third Party Complaint against HAAS was terminated, favorable for HAAS. Any termination of

of the action which resulted in HAAS paying no damages, attorneys fees or costs was favorable to HAAS. This termination of the action cannot be classified as unfavorable to HAAS, or a stipulated settlement. In addition, YATES was ordered to pay \$65.00 to HAAS as and for costs. This is also favorable to HAAS.

The Corrected Corrected Judgment reads, "...in conformity with the said stipulation and agreement of counsel...(App. 95a); the Minute Entry of the prior action dated November 16, 1979, states in part, "...the Court is advised that a stipulation of counsel has been reached and no one will appear this date ...IT IS ORDERED granting Summary Judgment in favor of...Haas in the sum of \$65.00." (App. 65a). The Trial court granted summary judgment in favor of HAAS. The Complaint was not dismissed by stipulation but by summary judgment. No stipulated judgment appears in the record. There was no stipulation as to the

judgment. There was no oral argument. In fact, there was no written stipulation of record. There are only affidavits from counsel describing what they agreed to. Therefore the Court must look to these affidavits to determine the substance of this agreement.

HASH, as counsel for YATES in the underlying malicious action, in his affidavit dated February 5, 1980, states in pertinent part, "...he (HASH) called David Postal, Haas' attorney, and informed him that the Third Party Plaintiff Yates did not wish to proceed with the litigation...That Postal...agreed to enter a Summary Judgment in favor of his client for costs only and no attorney's fees and that Postal thereafter advised affiant that the costs were as follows..."(App.75a).

David Postal, as counsel for HAAS in the underlying malicious action, in his affidavit dated February 19, 1980, states in pertinent part, "...he (David Postal)...received a call from Edgar Hash, that the tenor of the call

was that Hash did not wish to fight the Motion for Summary Judgment if Haas would waive attorneys' fees in the matter. ...Postal agreed to enter a Summary Judgment on (sic) the favor of his client for costs without attorneys' fees and advised affiant that the costs were...\$65.00." (App.81a).

There was no stipulation as to the merits of Haas' Motion for Summary Judgment. YATES, through her attorney, HASH, did not oppose the motion and, in effect, confessed judgment by agreeing to summary judgment in favor of HAAS, against herself.

HAAS's Motion for Summary Judgment was granted. The fact that YATES chose not to oppose the Motion does not negate the substance of the Motion. The only possible favorable termination of this underlying malicious action for HAAS was to have obtained a judgment against YATES dismissing the action. Not only did HAAS obtain the judgment against YATES, but YATES paid costs to HAAS. Where the

Plaintiff in a civil action seeks to mitigate losses and dismisses the action rather than taking it to the jury, and further agrees to the termination to avoid additional legal fees, costs and expenses, this cannot be held against the defendant in a subsequent action for malicious prosecution. To so hold would burden the courts with numerous worthless trials, and additional motion practice.

If there are negotiations or a negotiated settlement, the trial court must look to the subject of the negotiations, and if on the merits of the case, then the malicious prosecution action fails. However, if the negotiations relate only to the collateral issues, such as legal fees in this case, and not the merits of the case, then the malicious prosecution action prevails.

It is clear that the Arizona Court of Appeals erred. A negotiated settlement, of itself, is not an unfavorable termination. The subject of the negotiations must be

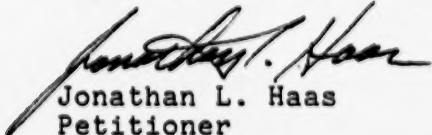
examined and only if they reflect unfavorably on the merits of the defendant's case is the termination unfavorable. In the case at bar HASH and YATES examined the merits of the case and concluded not only that the action was without merit, but that they would have to pay attorneys' fees and costs.

CONCLUSION

In its opinion, the Arizona Court of Appeals made several determinations which, taken singly or together, deprived Petitioner of Constitutional due process as guaranteed by the Fourteenth Amendment and as interpreted in decisions of this Court.

For these reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

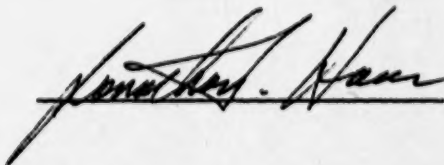


Jonathan L. Haas
Petitioner
P.O.Box 7461
Phoenix, Arizona 85011
602-277-6001

Date: December 24, 1982

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been served on all parties required to be served, i.e., on Respondent by placing same in an envelope and depositing it in the United States mail, with first class postage prepaid, addressed to counsel of record as follows:
Jefferson L. Lankford, Esq., Jennings, Strouss & Salmon, 111 West Monroe Street, 18th Floor, Phoenix, Arizona 85003, this 24th day of December, 1982

A handwritten signature in cursive script, appearing to read "Jonathan H. Hauer", is written over a horizontal line.

82-1125

FILE

DEC 27 1982

ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JONATHAN L. HAAS,
Petitioner,
v.
EDGAR HASH and ELAINE HASH,
Respondents.

Petition for a Writ of Certiorari
to the Court of Appeals of Arizona

Jonathan L. Haas
In Propria Persona
P.O.Box 7461
Phoenix, Arizona 85011
602-277-6001

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Volume 2 of 2

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5a

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W. Prosser, Law of Torts (4th ed. 1971)

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Division 1
Court of Appeals
State of Arizona
Filed JUL 27 1982

Glen D. Clark, Clerk
By /s/

In The
Court of Appeals
State of Arizona
Division One

| | | |
|-----------------------------|---|-----------------|
| JONATHAN L. HAAS, |) | 1 CA-CIV 5559 |
| |) | |
| Plaintiff-Appellant, |) | |
| |) | |
| v. |) | Department A |
| |) | |
| EDGAR HASH and ELAINE HASH, |) | |
| husband and wife, WANDA M. |) | MEMORANDUM |
| YATES, Executrix of the |) | DECISION |
| Estate of Flora Holman, |) | (Not for publi- |
| deceased, |) | cation-Rule 28, |
| |) | Arizona Rules |
| Defendants-Appellees. |) | of Civil |
| |) | Appellate |
| |) | Procedure) |

An Appeal from the Superior Court of Maricopa
County

Cause No. C-402225

The Honorable Stanley Z. Goodfarb, Judge

AFFIRMED

Jonathan L. Haas
In Propria Persona

Phoenix

Jennings, Strouss & Salmon
By W. Michael Flood and John A. Micheaels

Attorneys for Defendants-Appellees

Phoenix

CORCORAN, Judge

The primary issue on this appeal is whether a civil action terminated pursuant to negotiation, agreement and stipulation of the parties constitutes a "favorable termination" as is necessary for maintenance of an action for malicious prosecution.¹ We hold that it does not and affirm the summary judgment in favor of the defendants-appellees.

On January 14, 1980 appellant Jonathan L. Haas filed a malicious prosecution action against appellees

1. Arizona has recognized an action for malicious prosecution where the "prosecution" is a civil proceeding rather than a criminal prosecution. See Bird v. Rothman, 128 Ariz. 599, 627 P.2d 1097 (App. 1981) cert. denied 102 S.Ct. 327 (1981); Carroll v. Kalar, 112 Ariz. 595, 545 P.2d 411 (1976). The Restatement (Second) of Torts § 674 (1977) describes tort liability for the initiation or continuation of a civil proceeding without probable cause for a primary purpose other than securing adjudication of the claim, which terminates in favor of the defendant as an action for "wrongful use of civil proceedings."

Edgar and Elaine Hash, husband and wife, and Wanda Yates, as executrix of the estate of Flora Holman.² In the complaint Haas alleged that in a preceding action, Edgar Hash, an attorney, brought a third-party action against appellant Haas for fraud in Maricopa County Cause No. C-349188 on behalf of Wanda Yates, as the executrix of the estate of Flora Holman.

Appellant further alleged that summary judgment had been entered on January 9, 1980 in favor of Haas in the fraud action; that the fraud action had been brought by attorney Hash maliciously and without probable cause; and that as a result of the fraud action Haas had suffered injury to his business and reputation.

On May 29, 1980 the trial court took under advisement cross-motions for summary judgment filed by both parties in the malicious prosecution action. Appellees Hash sought summary judgment on the basis that there had

2. The record does not contain any affidavit of service on Wanda Yates and she is not a party to this appeal.

been no "favorable termination" for Haas in the prior proceeding because it had been terminated by a settlement agreement. The trial court considered the pleadings, the deposition of defendant Hash and the record in Maricopa County Cause No. C-349188 and on June 9, 1980 granted summary judgment in favor of defendants Hash. This appeal followed.

One of the essential elements of a claim for malicious prosecution is that the prior proceeding be terminated in favor of the plaintiff in the malicious prosecution action. Cullison v. City of Peoria, 120 Ariz. 165, 584 P.2d 1156 (1978); Nataros v. Superior Court, 113 Ariz. 498, 557 P.2d 1055 (1976). If the plaintiff in an action for malicious prosecution fails to establish the essential element of a "favorable termination" of the prior proceedings the defendant is entitled to judgment as a matter of law. Hansen v. Stoll, 130 Ariz. 454, 636 P.2d 1236 (App. 1981); Bearup v. Bearup, 122 Ariz. 509, 596 P.2d 35 (App. 1979).

Whether a stipulated judgment in a civil proceeding may be deemed a "favorable termination" for purposes of a subsequent malicious prosecution action has not been directly addressed in Arizona case law. Other jurisdictions, however, have held that where the prior proceedings terminate as a result of voluntary negotiation, settlement, or consent of the parties, there has been no such "favorable termination." See, e.g., Weaver v. Superior Court, 95 Cal.App.3d 166, 156 Cal.Rptr. 745 (1979); Cline v. Flagler Sales Corp., 207 So.2d 709 (Fla.App. 1968); Executive Commercial Services, Ltd. v. Dasalakis, 74 Ill.App.3d 760, 393 N.E.2d 1365 (1979); Miller v. Jamaica Savings Bank, 50 A.D.2d 865, 377 N.Y.S.2d 89 (1975); Tower Special Facilities, Inc. v. Investment Club, Inc., 104 Wis.2d 221, 311 N.W.2d 225 (App.1981). See also Restatement (Second) of Torts § 660(a) (1977); W. Prosser, Law of Torts § 120 at 853-54 (4th ed. 1971).

The rationale for disallowing termination

pursuant to settlement as a "favorable termination" for purposes of a malicious prosecution action has been stated as follows:

A dismissal resulting from negotiations, settlement, or consent is generally not deemed a favorable termination of the proceedings. ... In such a case the dismissal reflects ambiguously on the merits of the action as it results from the joint action of the parties, thus leaving open the question of defendant's guilt or innocence.

Minasian v. Sapse, 80 Cal.App.3d 823, 827, 145 Cal.Rptr. 829, 832 n. 4 (1978)

The reason for this rule is that where the termination of the case is brought about by a compromise or settlement between the parties, understandingly entered into, it is such an admission that there was probable cause that the plaintiff cannot afterwards retract it and try the question, which by settling he waived.

Tower Special Facilities, Inc. v. Investment Club, 104 Wis.2d at 228, 311 N.W.2d at 229 (quoting Lechner v. Ebenreiter, 235 Wis. 244, 252, 292 N.W. 913, 916-917 (1940)).

We find these cases persuasive and consistent with this court's decision in Bearup v. Bearup, supra, in which we recognized the principle that where a plaintiff in a malicious prosecution action consented to a

termination of a prior criminal action, leaving open the question of his guilt or innocence, there did not exist the essential element of a "favorable termination" of the prior action to permit a subsequent malicious prosecution action. In Bearup, this court stated:

We agree that as the prosecution was dismissed because of the pending civil litigation, appellee failed to show that the dismissal was in his favor. ... By consenting to a termination which left open the question of his guilt, appellee failed to obtain a favorable termination. He therefore cannot take advantage of it in a tort action for malicious prosecution. W. Prosser, Law of Torts, § 118 at 840 (4th ed. 1971).

122 Ariz. at 510, 596 P.2d at 36.

Although "summary judgment" was entered in favor of appellant in the fraud action, our inquiry does not end here. As stated by the Indiana Court of Appeals in Wong v. Tabor, 422 N.E.2d. 1279 (Ind.App. 1981),

Entry of summary judgment in favor of a prior defendant clearly constitutes termination in his favor. We recognize, however, that in reality judgment may be entered in favor of a party for a variety of reasons. We may not ignore the context in which the proceedings were terminated. If entry of summary judgment was merely the formal means of securing the parties' settlement benefits, the judgment

cannot form the basis for a malicious prosecution action.

The threshold inquiry thus becomes whether the prior suit ... was in fact terminated ... by compromise or settlement.

422 N.E.2d at 1284.

Thus, we must determine whether the record in this matter reflects that the termination of the fraud action upon which this malicious prosecution action is based left open the merits of the fraud action.

The initial judgment entered on January 9, 1980 in the fraud action recites that the court made a specific finding on the merits of the complaint. However, by minute entry dated March 3, 1980 the trial court found that a copy of the formal judgment had never been received by Attorney Hash before it was signed and was incorrect. Apparently, Attorney Hash had not become aware of the formal judgment until after the filing of the malicious prosecution action. The trial court granted Attorney Hash's motion to correct the formal judgment. The "Corrected Judgment" signed on April 3, 1980 provides in

part:

The Court having considered the motion [to correct the formal written judgment] and having reflected upon its own recollection of the hearing on motion for summary judgment, finds that:

There was a stipulation by counsel for the granting of the summary judgment upon the payment of costs of \$65.00 and that there was no determination of the motion on the merits, and the stipulation indicated that such was not to be done.

The operative portion of the "Corrected Judgment" reads:

IT IS FURTHER ORDERED, in conformity with the said stipulation and agreement of counsel, that the Defendants Jonathan L. Haas and Hiroe Haas have judgment against the Personal Representative of the Estate of Flora Holman, Deceased, in the sum of \$65.00 as and for court costs.

The trial judge in this litigation, who was also the judge to whom the underlying fraud action was assigned, reviewed the record and stated in his minute entry order, dated June 3, 1980:

The record in C 349188 [the fraud action] clearly shows that the final Corrected Judgment was the result of stipulation and negotiation. The thrust of all minute entries, pleadings, document and judgments which followed the initial minute entry of November 16, 1979 is clear that counsel Hash and counsel Postal [former counsel for appellant] entered into an agreement that

Mrs. Yates' Third-Party Complaint against Mr. Haas would be allowed to expire graciously provided that Mr. Haas' court cost of \$65 was paid. While the original judgment signed on January 8, 1980 appears to the contrary, that judgment was subsequently corrected after a motion and hearing on March 3, 1980.

The record in this matter clearly reflects that there was no determination on the merits of the fraud action. By consenting to a termination which left open the question of fraud, appellnt failed to obtain a favorable determination. Consequently, appellant could not take advantage of the stipulated judgment in a subsequent court action for malicious prosecution.

Having found that appellant failed to establish an essential element of the claim for malicious prosecution, we find it unnecessary to address appellant's contention that summary judgment should have been entered in his favor.

The judgment of the trial court is affirmed.

/s/ Robert J. Corcoran

Robert J. Corcoran, Judge

CONCURRING:

/s/ Jack L. Ogg

Jack L. Ogg, Presiding Judge
Department A

/s/ Donald F. Froeb

Donald F. Froeb
Judge

IN THE SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

23 June 3, 1980 HON. STANLEY Z. GOODFARB
DIV. DATE JUDGE OR COMMISSIONER

WILSON D. PALMER Clerk
E. Schneider Deputy

C-402225

JONATHAN L. HAAS

David R. Postal

vs.

EDGAR HASH, et., et al.

W. Michael Flood
John A. Michaels

On May 29, 1980 this court took under advisement the Cross-Motions for Summary Judgment filed by both parties in this case. Subsequent to that hearing, the court read the deposition of defendant Edgar Hash and reread all the pleadings contained in C 349188, which case gave rise to the action herein, as it was therein that the alleged wrongful civil proceedings were supposed to have occurred. It is the contention of plaintiff herein that the third-party complaint brought in that action was wilfully, fraudulently and maliciously

brought by the defendant Hash.

Plaintiff's Cross-Motion for Summary

Judgment is, of the two motions, the most easily disposed of since there are substantial factual issues which would have to be resolved before liability can be found for plaintiff. The claims of wrongful civil proceedings are vigorously denied and disputed by Mr. Hash in his deposition. His testimony therein clearly raises factual issues of material importance which would prevent summary judgment in favor of the plaintiff.

The defendants also request summary judgment in their favor because the record in C 349188 clearly indicates that there was not a "favorable termination" in behalf of the plaintiff herein, Jonathan L. Haas, in that case. The element of a "favorable termination" for plaintiff in the malicious prosecution action is essential to any action of that type. Notaros vs. Superior Court, 113 Ariz. 498, 557 P.2d 1059 (1976); Cullison v. City of Peoria,

120 Ariz. 165, 169, 584 P.2d 1156 (1978);
Bearup v. Bearup, 122 Ariz. 509, 596 P.2d 35
(Ariz.App. 1969).

All cases seem to be very clear that where the prior proceedings is terminated by a voluntary negotiation, settlement or consent of the parties, as a matter of law, it cannot serve as the needed element of "favorable termination". Even the case cited by plaintiff, Minnasion v. Sapse, 145 Cal.Rptr. 829 foot note 4 (1978) is to the same effect. See also Prosser, "Law of Torts 4th Ed 1971, pages 839, 840, 854; Restatement of Torts SECOND, § 674(b) comment p. 456.

The record in C 349188 clearly shows that the final Corrected Judgment was the result of stipulation and negotiation. The thrust of all minute entries, pleadings, document and judgments which followed the initial minute entry of November 16, 1979 is clear that counsel Hash and counsel Postal entered into an agreement that Mrs. Yates' Third-Party Complaint against Mr. Haas would be allowed to

expire graciously provided that Mr. Haas' court costs of \$65 was paid. While the original judgment signed on January 8, 1980 appears to the contrary, that judgment was subsequently corrected after a motion and hearing on March 3, 1980. That minute entry specifically says:

"...The Court having considered the motion and having reflected upon its own recollection of the hearing on motion for summary judgment, agrees with the motion of the Personal Representative Yates. There was a stipulation for the granting of the summary judgment upon the payment of costs of \$65.00. There was no determination of the motion on the merits, and the stipulation indicated that such was not to be done.

....

There was contained in the judgment a specific finding on the merits which this Court did not do.

....

IT IS ORDERED granting motion of Personal Representative Yates to correct the judgment."

The judgment which the court thereafter entered on April 3, 1980 is also in conformity therewith stating:

"There was a stipulation by counsel for the granting of the summary judgment upon the payment of costs of \$65.00 and that there was no determination of the motion on the merits, and the stipulation indicated that such was

not to be done."

The court finds that the record in C 349188 shows an(sic) negotiated agreement which the court effecutuated. Without more, the initial element for a malicious prosecution action of "favorable termination" is missing and summary judgment in favor of the defendants is required as a matter of law.

IT IS HEREBY ORDERED granting summary judgment in favor of the defendants and against the plaintiffs.

17a

Division 1
Court of Appeals
State of Arizona
Filed SEP 1 1982

Glen D. Clark, Clerk
By /s/

In The
Court of Appeals
State of Arizona
Division One

| | |
|-----------------------------|-------------------|
| JONATHAN L. HAAS, |) 1 CA-CIV 5559 |
| |) Department A |
| Plaintiff-Appellant, |) |
| |) |
| vs. |) MARICOPA County |
| |) Superior Court |
| EDGAR HASH and ELAINE HASH, |) No. C-402225 |
| husband and wife, WANDA M. |) |
| YATES, Executrix of the |) |
| Estate of Flora Holman, |) <u>ORDER</u> |
| deceased, |) |
| |) |
| Defendants-Appellees.) |) |

The motion for rehearing and response thereto were considered by the court, Presiding Judge Jack L. Ogg and Judges Donald F. Froeb and Robert J. Corcoran participating.

IT IS ORDERED denying the motion for rehearing.

DATED this 1st day of September, 1982.

/s/ Jack L. Ogg
Jack L. Ogg, Presiding Judge
Department A

A true copy of the foregoing
order was mailed this 1st
day of September, 1982, to:

Mr. Jonathan L. Haas
P.O.Box 7461
Phoenix, Arizona 85011
Appellant

Mr. W. Michael Flood
Jennings Strouss & Salmon
111 West Monroe Street
Suite 1700
Phoenix, Arizona 85003
Attorneys for Appellees

GLEN D. CLARK, CLERK
BY

/s/
DEPUTY CLERK

SEAL

S.Alan Cook
CLERK

Supreme Court
STATE OF ARIZONA
202-West Wing
CAPITOL BUILDING
(602)255-4536
Phoenix 85007

Anna L. Cates
CHIEF DEPUTY
CLERK

September 29, 1982

JONATHAN L. HAAS,

Plaintiff-Appellant,

vs.

EDGAR HASH and ELAINE HASH
Husband and wife, WANDA M.
YATES, Executrix of the
Estate of Flora Holman,
deceased,

Defendants-Appellees

)
)
) Supreme Court
) No. 16174-PR
)
)
) Court of Appeals
) No. 1 CA-CIV 5559
)
)
) Maricopa County
) No. C-402225
)
)
)

The following action was taken by the
Supreme Court of the State of Arizona on
September 28, 1982 in regard to the above-
entitled cause:

"ORDERED: Petition for Review = DENIED"

Record returned to the Court of Appeals,
Division One, Phoenix, this 29th day of
September, 1982.

S.ALAN COOK, Clerk

20a

By /s/ Anna L. Cates
Chief Deputy Clerk

TO:

Jonathan L. Haas, P.O.Box 7461, Phoenix,
Arizona 85011

W. Michael Flood, Esq. and John A. Micheals,
Esq., Jennings, Strouss & Salmon, 111 West
Monroe, 18th Floor, Phoenix, Arizona 85003

Hon. Stanley Z. Goodfarb, Judge, Maricopa
County Superior Court, 201 West Jefferson,
Phoenix, Arizona 85003

Glen D. Clark, Clerk, Court of Appeals,
Division One, West Wing, State Capitol
Building, Phoenix, Arizona 85007

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

| | | |
|-----------------------------|---|-------------------|
| JONATHAN L. HAAS, |) | No. 1 CA-CIV 5559 |
| |) | |
| Plaintiff-Appellant, |) | Maricopa County |
| |) | Superior Court |
| vs. |) | No. C 402225 |
| |) | |
| EDGAR HASH and ELAINE HASH, |) | MOTION FOR |
| husband and wife; WANDA M. |) | REHEARING |
| YATES, Executrix of the |) | |
| Estate of Flora Holman, |) | |
| deceased, |) | |
| |) | |
| Defendants-Appellees. |) | |
| |) | |

Appellant respectfully moves the Court for a rehearing because of the following points:

1. The Court erred in their determination of favorable termination.

2. The Court gravely erred in their determination of the facts surrounding the termination of the underlying malicious civil action, cause No. C 349188.

RESPECTFULLY SUBMITTED this 11th day of August, 1982.

/s/Jonathan L. Haas
Jonathan L. Haas
P.O.Box 7461
Phoenix, Arizona 85011
277-6001

MEMORANDUM OF POINTS AND AUTHORITIES

The Court considered the issue of whether a civil action terminated pursuant to negotiations, agreement and stipulation of the parties constitutes a "favorable termination" as is necessary for maintenance of an action for malicious prosecution. The Court reached far afield to justify its conclusion that it does not, while they could have looked next door to California for justification that it does, under some circumstances.

As the Court correctly stated:

"One of the essential elements of a claim for malicious prosecution is that the prior proceedings be terminated in favor of the plaintiff in the malicious prosecution action. Cullison v. City of Peoria, 120 Ariz. 165, 584 P.2d 1156 (1978); Nataros v. Superior Court, 113 Ariz. 498, 557 P.2 1055 (1976). If the plaintiff in an action for malicious prosecution fails to establish the essential element of a "favorable termination" of the prior proceedings the defendant is entitled to judgment as a matter of law. Hansen v. Stoll, 130 Ariz. 454, 636 P.2d 1236 (App. 1981); Bearup v. Bearup, 122 Ariz. 509, 596 P.2d 35 (App. 1979)." (Slip opinion at p.3)

"Whether a stipulated judgment in a civil proceedings may be deemed a "favorable termination" for purposes of a subsequent malicious prosecution action has not been directly addressed in Arizona case law." (Slip opinion at p. 3)

The Court then views the issue of favorable termination with tunnel vision and concludes that other jurisdictions have held that where the prior proceedings terminate as a result of voluntary negotiations, settlement, or consent of the parties, there has been no such favorable termination, citing Weaver v. Superior Court, 95 Cal.App.3d 166, 156 Cal. Rptr. 745 (1979); Cline v. Flagler Sales Corp. 207 So.2d 709 (Fla.App. 1968); Executive Commercial Services, Ltd. v. Daskalahis, 74 Ill.App.3d 760, 393 N.E.2d 1365 (1979); Miller v. Jamaica Savings Bank, 50 A.D.2d 865, 377 N.Y.S.2d 89(1975); Tower Special Facilities Inc. v. Investment Club, Inc., 104 Wis.2d 221, 311 N.W.2d 225 (App. 1981), as well as two authorities.

Weaver is a California case involving a malicious prosecution action by a doctor against a former patient. The underlying malicious civil action was terminated by the patient dismissing the complaint. The appellant court concluded that the reason for the

dismissal, which would determine if the dismissal constituted a favorable termination, was a triable issue of material fact, and remanded the cause back to the trial court. The court stated, "...any attempt to equate her voluntary dismissal with prejudice to an unfavorable termination as urged by petitioner, is a question of fact for the jury to decide." 156 Cal.Rptr. at 764. Such is the situation with the cause at bar. At a minimum the Court should have remanded for a jury trial.

The Weaver court went on to say:

"Clearly, then, a defense verdict or a dismissal on the merits equates with a favorable termination and thus establishes the first element of a malicious prosecution case. Similarly, a favorable termination arises from a dismissal for failure to prosecute under Code of Civil Procedure section 583, subdivision (a). (Minasian v. Sapse, 80 Cal.App.3d 823, 827[145 Cal.Rptr. 829].) Contrastingly, however, when a dismissal results from negotiation, settlement, or consent, a favorable termination is normally not recognized ..." (emphases added). 156 Cal.Rptr. at 763.

The question the Court should have addressed is under what circumstances is it recognized. And the answer is when the negotiations did not relate to the merits of

the case, but to collateral matters, such as costs, attorney's fees, oral argument and the like.

Cline is a Florida case involving a malicious prosecution action by a vendee against a vendor. The underlying malicious criminal action was terminated by settlement before a justice of the peace, and the court found that such a determination will not support such a charge. Such is not the case at bar, as neither party nor their attorneys appeared before the court to settle the matter.

Executive Commercial Services, Ltd. is an Illinois case involving a landlord--tenant dispute in which a writ ne exat was issued. The underlying civil action complained of in the malicious prosecution action was the writ ne exeat. The court held that where the original proceedings were not terminated, the vacating of the writ was not a favorable termination. Such is not the case at bar.

Miller is a New York case involving a mortgage foreclosure action. The court held that the cause of action for malicious prosecution did not lie as the foreclosure action of which the plaintiffs complained was discontinued by agreement entered into by both parties to the action. The agreement was in writing. Such is not the case at bar.

Tower Special Facilities, Inc. is a Wisconsin case involving a personal injury action and impleading several third parties, insurance agents, companies and brokers. All parties to this underlying action signed a Stipulation and Order for Dismissal, dismissing all claims without costs to any party. The court found this voluntary compromise and settlement of the underlying suit not to be a favorable termination. Such is not the case at bar.

In the case at bar the question of the facts surrounding the Summary Judgment in favor of Appellant constitutes triable issues of material fact to be decided by a jury.

The Court cites part of a footnote from Minasian v. Sapse, 80 Cal.App.3d 823, 827, 145 Cal.Rptr. 829, 832, n.4 (1978)

"A dismissal resulting from negotiation, settlement, or consent is generally not deemed a favorable termination of the proceedings... In such a case the dismissal reflects ambiguously on the merits of the action as it results from the joint action of the parties, thus leaving open the question of the defendant's guilt or innocence."

The Court overlooks the opinion of the court in the body of the decision and cites only a footnote.

"The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice establishes the tort, that is, the malicious and unfounded charge...against an innocent person. If the accused were actually convicted, the presumption of his guilt or of probable cause for the charge would be so strong as to render wholly improper any action against the instigator of the charge." (Jaffe v. Stone, 18 Cal. 2d 146, 150, 114 P.2d 335, 338.)

'[I]t is now the well-established rule that a verdict or final determination upon the merits of the malicious civil suit or criminal prosecution complained of is not necessary to the maintenance of an action for malicious prosecution, but that it is sufficient to show that the former proceeding had been legally terminated.' (Original emphasis.) (Hurgren v. Union Mutual Life Ins. Co., 141 Cal. 585, 587, 75 P.168; Hudson v. Zumwalt, 64 Cal.App.2d 866, 872, 149 P.2d 457.) Of course where the termination of the former proceeding is not on the merits it is somewhat more difficult to ascertain whether it indicates the innocence of the defendant in the action. Nevertheless, the theory is the same in test-

ing a dismissal or other termination without a trial on the merits. 'If it is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination.' (Jaffe v. Stone, 18 Cal.2d 146, 150, 114 P.2d 335, 338.)

A dismissal for failure to prosecute...is not a dismissal on technical grounds within the meaning of the Jaffe opinion. (Rest.2d Torts, S 674, com.j; see Williams v. California M.P. Assn., 136 Cal. App. 172, 28 P.2d 59.) Whether or not the termination of an action prior to a determination on the merits tends to indicate innocence on the part of the defendant of the acts with which he is charged must depend on whether the manner of termination reflects on the merits of the matter. In some instances the manner of termination reflects the opinion of the court that the action lacks merit, as where criminal proceedings are dismissed for lack of sufficient evidence of guilt following a preliminary hearing. (Jaffe v. Stone, 18 Cal.2d 146, 114 P.2d 335.) In others, the termination reflects the opinion of the prosecuting party that, if pursued, the action would result in a decision in favor of the defendant, as where the district attorney seeks dismissal of the prosecution of a criminal action for lack of evidence (Jackson v. Beckham, 217 Cal.App.2d 264, 269-270, 31 Cal.Rptr. 739; see Sutherland v. Palme, 93 Cal.App.2d 307 313, 208 P.2d 1035 [insanity proceedings]), or where the plaintiff in a civil proceeding voluntarily dismisses the action (MacDonald v. Joslyn, 275 Cal.App.2d 282, 289, 79 Cal.Rptr. 707; Kennedy v. Byrum, 201 Cal.App.2d 474, 479-480, 20 Cal. Rptr 98). By way of contrast, a dismissal, say, for lack of jurisdiction (see Ferraris v. Levy, 223 Cal. App.2d 408, 411, 36 Cal.Rptr. 30) not only is not on the merits, it is unreflective of the merits; neither the judgment of the court nor that of the

prosecuting party on the merits is implicated in the dismissal.

A dismissal for failure to prosecute...does reflect on the merits of the action, and that reflection is favorable to the defendant in the action. The reflection arises from the natural assumption that one does not simply abandon a meritorious action once instituted. In Dowling v. Polack, 18 Cal. 625 suit was brought on an injunction bond. The party who had secured the temporary injunction did not appear at the hearing on the merits; on motion of defendants the suit was dismissed. While perhaps not strictly on point the opinion of the court at page 628 is instructive: 'Looking at the matter in the light of principle, it would seem that the failure of the plaintiff to prosecute his suit should be regarded as a concession of his inability to maintain it. The issues are not actually examined and passed upon, but by his failure to appear he virtually confesses that the result of the trial would be to find them against him.' Minasian v. Sapse, supra at 831-832

In the case at bar Appellees Hash did not oppose a Motion for Summary Judgment and agreed to pay costs to Appellant Haas. No written document, not for that matter, any argument, reflects that any discussion was had or agreements made relating to the merits of the case. The termination of the underlying fraud case reflects the opinion of Appellees Hash, that, if pursued, the action would have resulted in favor of Appellant Haas.

The Court then cites a paragraph from Wong v. Tabor, 422 N.E.2d 1279 (Ind.App. 1981). If the Court had read the rest of this case, which is almost identical to the case at bar, they would have concluded that not contesting entry of a summary judgment was considered a favorable termination.

"The evidence reveals that an associate from Tabor's office advised Wong's attorney just prior to the hearing that the Privetts would not contest entry of summary judgment in Wong's favor. However, nothing in the record indicates this conversation involved any compromise or settlement on the part of both parties. While Tabor may have decided to forego his opportunity to contest the summary judgment motion, there is no suggestion this decision was induced by anything more than his choice to do so. There is no evidence the parties had agreed prior to the hearing to terminate the action with entry of summary judgment merely providing the vehicle for securing their agreement. Thus, while Wong benefitted from Tabor's decision, nothing suggests he bargained quid pro quo for such a result.

Compromise and settlement implies something more than one party merely advising another as to his decision with regard to a particular matter in dispute. At a minimum, settlement requires some act or process of adjusting one's differences in reaching an agreement over disputed matters. See, e.g. Black's Law Dictionary 1538-39 (4th Ed. 1957). The actions presented here in electing to not oppose summary judgment are reasonably susceptible to interpretation as simply constituting a voluntary withdrawal of the Privetts' claim against Dr. Wong. Voluntary abandonment or discontinuance of the claim would be sufficient to constitute termination

in favor of the defendant. Sasse v. Rogers(1907)40 Ind. App. 197, 81 N.E. 590." Wong, supra at 1284-5.

The opposing counsels in the underlying malicious civil action have both filed sworn affidavits. (R.11n and 110) These are the only sworn testimony of record relating to any negotiations, agreements, stipulation or settlement in the underlying action. Therefore the Court must look to these affidavits to determine the facts. Both Affidavits state that Appellee Hash, as counsel for Wanda Yates (not a party to this action), telephoned David Postal, counsel for Appellant Haas in the underlying action, and informed him "...Yates did not wish to proceed with the litigation..." These facts are uncontested and sworn to by both counsels. This is exactly what happened in Wong above. The plaintiff voluntarily withdrew their claim against Haas. "Voluntary abandonment or discontinuance of the claim would be sufficient to constitute termination in favor of the defendant." Wong, supra at 1285.

The Court in reviewing the record failed to

glean many of the significant facts. In the case at bar the Court can decide the issues of fact as well as law. No oral testimony was presented to the trial court, the matter was determined on the basis of the record, exhibits and affidavits. Although a trial judge is generally in a better position than an appellate court to decide issues of fact, an exception to this rule is where a decision is reached purely on documentary evidence, as is the situation in the case at bar. Goodman's Market, Inc. v. Ward, 4 Ariz.App. 456, 421 P.2d 538 (1966); DeSantis v. Dixon, 72 Ariz. 345, 236 P. 2d 38 (1951) The Court should evaluate the totality of the evidence in reaching its decision.

The facts are accurately set forth in Appellant's Opening Brief, pages 1-9, citing the documentary evidence in the record. These facts establish that Appellee Edgar Hash, as counsel for Yates in the underlying action, knowingly filed a false and fraudulent third party complaint against Appellant Haas. In

that third party complaint the allegations relating to representations concerning a certain mortgage and assignment are boldfaced lies. Appellee Hash did not draw this mortgage and assignment until over a month after he alleges Haas misrepresented them. In their depositions Richard Rowe (deceased) and Hash readily admit this fact. Hash attempted to perpetrate a fraud on the Court by filing a complaint containing known false allegations.

This was done by Appellee Hash to cover up his own negligence or incompetence in failing to obtain adequate security for a deferred payment due from the sale of a piece of real estate from the Estate of Flora Holman, deceased, Wanda Yates personal representative.

In late October or early November, 1979, a motion for summary judgment filed by Haas in the underlying malicious action, was noticed for oral argument. Hash, with over two years of discovery and not one shread of evidence to support his allegations, advised Haas' counsel,

David Postal, that he was not going to oppose Haas' motion for summary judgment. Hash knew this would be a futile effort and tried to salvage paying legal fees, if he could. Hash states in his Affidavit (R 11n) that..."Third Party Plaintiff Yates did not wish to proceed with the litigation..."; Hasj did not offer to settle, negotiate or compromise the action, he only offered to throw in the towel if he could save paying attorney's fees. If Hash thought his client had a meritorious action why was he afraid of paying attorney's fees? Because he was of the opinion that his client's action was without merit.

The trial court granted Appellant Haas's motion for summary judgment and on January 9, 1980, signed the formal judgment. Copies of the formal judgment were sent to the Clerk of the court, Edgar Hash and the original to the Honorable Goodfarb. The trial judge and the clerk acknowledged receiving their copies, as is evidenced by their presence in the record. The Complaint in the action at bar was filed

January 11, 1980, over five weeks after the formal summary judgment was lodged with the court and a copy sent to Hash.

It was well into February, 1980, before Hash notified the trial court that he did not receive a copy of the formal judgment. Although the record established Hash's lack of veracity, the court accepted Hash's word that he did not receive a copy of the formal judgment and that the judgment was in error, while disregarding the testimony of David Postal, counsel for Haas.

The Corrected Judgment in Cause C 349188, the underlying malicious action was signed by the trial court judge on April 3, 1980, three months after the complaint in the case at bar was filed. This corrected judgment contains the wording, "...there was no determination of the motion on the merits, and the stipulation indicated that such was not to be done." The members of the appellate court should draw upon their vast numbers of years of experience on

the bench and ask themselves if they have ever seen wording like this in an honest and legitimate judgment.

The fact that the original formal judgment lodged with the court reflected a decision on the merits establishes that Haas did not negotiate a settlement of the action and that Yates, represented by Hash, was simply not opposing the motion for summary judgment.

The statement in the Corrected Judgment that "this determination has now been utilized by the Defendants Haas as the basis for a malicious prosecution action." is quite unusual to say the least. Could it be that the trial judge was over protective of this erring attorney, and that his concern was reflected in the language of the Corrected Judgment?

The Third Party Complaint filed by Hash, as counsel, in the underlying malicious action was an out and out fraud. The games played by the trial judge and Hash in concocting an unfavorable termination of the underlying malicious

action was a travesty of justice. Even the appellate court has shielded this incompetent attorney Hash. If the Courts will not protect the people from incompetent and dishonest attorneys, then to whom shall the people turn?

Appellant moves the Court to remand this cause so that it can be heard before an impartial tribunal. The procedural requirement of a favorable termination rather than a final termination should not be allowed to interfere with Appellant's right to substantive due process.

Respectfully submitted

s/Jonathan L. Haas

Jonathan L. Haas

Box 7461

Phoenix, Arizona 85011

277-6001

Original and 5 copies of the foregoing hand delivered to the Court of Appelas this 11th day of August, 1982.

Two copies of the foregoing mailed this 11th day of August, 1982, to:

Jefferson L. Lankford
Jennings, Strouss & Salmon
111 West Monroe
Phoenix, Arizona 85003
By s/ J.L.Haas

DIVISION 1
 COURT OF APPEALS
 STATE OF ARIZONA
 Filed SEP 13 1982
 GLEN D. CLARK, CLERK
 BY /s/

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

| | | |
|-----------------------------|---|-----------------|
| JONATHAN L. HAAS |) | |
| |) | |
| Plaintiff-Appellant, |) | |
| |) | |
| vs. |) | 1 CA-CIV 5559 |
| |) | Maricopa County |
| EDGAR HASH and ELAINE HASH, |) | No. C 402225 |
| husband and wife, |) | |
| |) | PETITION FOR |
| Defendants-Appellees. |) | REVIEW |
| |) | |

Appellant Petitions the Supreme Court of Arizona to review the decision of the Court of Appeals in this matter. Appellant's motion for rehearing in the Court of Appeals was denied on September 1, 1982.

/s/Jonathan L. Haas
 Jonathan L. Haas
 P.O.Box 7461
 Phoenix, Arizona 85011
 277-6001
 Appellant

Copy of the foregoing mailed this

39a

13th day of September, 1982, to:

Jefferson L. Lankford
Jannings, Strouss & Salmon
111 West Monroe
Phoenix, Arizona 85003

by sig/ J. L. Haas

EDGAR HASH and ELAINE HASH,
husband and wife, WANDA M.
YATES, Executrix of the Es-
tate of Flora Holman, deceased,
Defendants-Appellees.

DEPARTMENT A

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order dated the 28th day of September,

1982, the Arizona Supreme Court denied the petition for review, Supreme Court No. 16174-PR.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the decision of this Court, a copy of the memorandum decision being attached hereto.

WITNESS, THE HONORABLE JACK L. OGG,
Presiding Judge, Department A, Division One of
the Court of Appeals of the State of Arizona,
on October 6, 1982.

(SEAL)

GLEN D CLARK, Clerk
By

/s/ Glen D. Clark
Chief Deputy Clerk

Appellees:

TAXATION

| | |
|-----------------|-----------------|
| Filing Fee..... | \$15.00 |
| Brief | 90.00 |
| TOTAL | <u>\$105.00</u> |

The original of the foregoing MANDATE and a copy of the memorandum decision of the Court were mailed to the Clerk of the Superior Court for Maricopa County, Arizona on October 6, 1982. A Copy of the MANDATE was mailed on said day to each party appearing or the attorneys of record.

JENNINGS, STROUSS & SALMON
 111 West Monroe
 Phoenix, Arizona 85003
 Telephone (602)262-5911

Attorneys for Defendants Edgar and Elaine Hash

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JONATHAN L. HAAS,

Plaintiff,

vs.

EDGAR HASH and ELAINE HASH,
 husband and wife, WANDA M.
 YATES, Executrix of the Estate
 of Flora Holman, deceased,

Defendants.

No. C402225

JUDGMENT ON
 MANDATE

(Assigned to
 Judge Good-
 farb, Divi-
 sion 20)

On June 9, 1980, this Court's judge-
 ment was entered ordering that the Defendants
 Hash have judgment.

Plaintiff prosecuted a timely appeal.
 On July 27, 1982, the Court of Appeals, Divi-
 sion One, in JONATHAN L. HAAS, Plaintiff-Appel-
 lant, v. EDGAR HASH and ELAINE HASH, husband and
 wife, WANDA M. YATES, Executrix of the Estate of
 Flora Holman, deceased, Defendants-Appellees,

1 CA-CIV 5559, Department A, rendered its opinion affirming the judgment of this Court.

Plaintiff made a timely motion for rehearing and a timely petition for review, both of which were denied.

On October 6, 1982, the Court of Appeals transmitted its mandate to this Court, commanding that such proceedings be had as shall be required to comply with its opinion.

Therefore, in accordance with the Opinion and Mandate of the Court of Appeals, Division One, and the Statement of Costs filed in this Court.

IT IS ORDERED, ADJUDGED AND DECREED that the Defendants Hash have judgment in the amount of \$155.25.

Dated: _____

Stanley Z. Goodfarb
Judge of the Superior Court

Copy of the foregoing mailed
this 12th day of October, 1982 to:

Jonathan L. Haas
P.O.Box 7461
Phoenix, Arizona 85011

and a copy lodged with
Hon. Stanley Z. Goodfarb
Judge, Maricopa County
Superior Court, Division 20
201 West Jefferson
Phoenix, Arizona 85003

/s/ W. Michael Flood

ED THIRKHILL REALTY

"One of Arizona's Largest"

PURCHASE CONTRACT, RECEIPT and ESCROW INSTRUCTIONS

Escrow No. _____ City of: Phoenix, Arizona

Nov. 18, 1974

RECEIVED FROM STATE INVESTMENT CORPORATION, an
Arizona corporation, or nominee, who will take
title as (check one) ☒ Community Property
Estate (husband and wife), ☐ Joint Tenants
With Right of Survivorship, ☐ Tenants in
Common, ☐ Sole and Seperate, the sum of TWO
HUNDRED FIFTY and no/100- - - -DOLLARS
(\$250.00- - -) as earnest money and part
purchase price (accepted subject to collection
and to be deposited in the broker's trust
account or with a duly licensed title company)
for the following described property, situated
in the County of Maricopa, State of Arizona
(together with all improvements thereon): Lot
11, Block 1, PHOENICIA, aka 2226 North Dayton,
Phoenix, including all furniture therein for
the full purchase price of TWELVE THOUSAND

FIVE HUNDRED and no/100- - -(\$12,500.00--),

payable as follows:

\$250.00 Earnest money and part purchase price , by corporate check payable to Minnesota Title.

\$_____ Additional earnest money on or before _____

\$1,250.00 BALANCE of cash payment to be paid on or before close of escrow

\$_____ PRINCIPAL sum remaining unpaid on encumbrance of record due to _____

\$_____ PRINCIPAL sum remaining unpaid on _____

\$11,000.00 BALANCE to be evidenced by agreement for sale assignment payable at \$105.00 or more per month including interest at 7½% per annum.

OTHER MATTERS AFFECTING SAID PROPERTY ARE AS FOLLOWS: * If Standard Land Title & Trust Agency serves as escrow agent, Ed Thirkhill Realty will receive in addition to its real estate commission, an amount equal to a minimum of

one half ($\frac{1}{2}$) of the escrow fund under a
a percentage lease arrangement between the
two companies. This contract is subject to
buyer's written acceptance of interior
inspections. Buyer shall pay all normal clos-
ing costs of buyer and seller, including
real estate commission; the balance of the
above agreement for sale assignment shall be
reduced by this amount. Subject to approval
of sale by probate court.

APPROVED 11/20/74 /s/R Rowe

☒ The FHA Amendatory statement is a condition
of this contract . The title to all future
payments under Agreement for Sale, if any,
shall be held by the payees indicated in the
following manor (check one): ☒ As community
property estate (husband and wife); ☐ As
joint tenants with right of survivorship;
☐ As tenants in common; ☐ Sole and Seperate.

10 /s/E.H.

1. On or before December 6, 1974, is
hereby specified as date of close of ESCROW
AND COMPLIANCE. PRORATION of the following

items indicated by an "X", shall be as of close of Escrow, unless otherwise specified.

☒ Taxes ☒ Rents ☐ Paving and/or other special Assessments ☒ Irrigation Assessments

☒ Existing Insurance ☒ Interest

☐ Seller to cancel the existing insurance; Purchaser to provide his own in the amount required by the Lender.

Possession shall be delivered upon close of escrow.

ALL payable assessments existing prior to close of escrow are to be paid in full by the Seller; future and proposed by Purchaser unless otherwise specified. Other encumbrances, if any, by Seller unless otherwise specified.

Proration of taxes, paving or other special assessments and irrigation assessments are to be made on a calendar year and 30 day month basis. Taxes to be calculated upon the amount shown on the last available County Treasurer's assessment unless otherwise specified.

2. Purchaser ☐ assumes and agrees to

pay or ☐ takes subject to the encumbrance(s) listed above. The unpaid balance due thereon is approximate. First payment after close of escrow and all subsequent due under existing encumbrances shall be made by Purchaser, all prior by Seller. Any differences shall be reflected in the: ☐ BALANCE OF CASH PAYMENT, ☐ DEFERRED BALANCE, ☐ PURCHASE PRICE. The reserve fund (impoundments), if any, held by Lender in connection therewith is to be refunded to seller.

3. A Bill of Sale will be handed to Escrow Agent for delivery to Purchaser on close of escrow, or as may be specified, if hereafter personal property is to be transferred as part of this transaction. ☒ YES ☐ WAIVED

4. Purchaser and Seller hereby designate *Minnesota Title (Dale Hallock) as Title Insurer and Escrow Agent in connection with the sale of the above described property, by Seller to Purchaser upon the terms and conditions set forth above and on the reverse side hereof which shall be complied with by

said parties on or before compliance date shown above or as soon thereafter as possible, unless a demand for cancellation has been made on Escrow Agent as herein provided. Unless otherwise set forth herein, Purchaser and Seller shall each pay one-half (1/2) of the escrow fee and 1/2 mortgage transfer fee, Seller is to pay the title insurance premium, affidavit and the recording fee of any instruments necessary to clear title to Purchaser. Purchaser is to pay the recording fee of the vesting instrument and any other recording fees required to satisfy the escrow. All charges as set forth above are in accordance with the prevailing custom unless otherwise specified. All costs of securing new financing to be borne by Purchaser except the discount fee to be paid by the Seller for Federal Government insured Loans, Conventional loan costs by Purchaser unless otherwise specified.

5. Purchaser and Seller agree that the ESCROW NUMBER and designated TITLE COMPANY may

be inserted after execution of this contract by the undersigned and these insertions will not void this contract.

6. This offer shall be accepted by the Seller on or before upon presentation. The Purchaser agrees not to withdraw this offer during said period unless earlier rejected by the Seller. Written notice of acceptance given to the Broker shall be notice to Purchaser.

7. Time is the essence of this contract.

8. THIS CONTRACT IS SUBJECT TO PROVISIONS AND CONDITIONS ON THE REVERSE HEREOF.

ED THIRKHILL REALTY BY /s/J.L.Haas
PURCHASER State Inv. Corp by Address
/s/ F. Patterson Address

ACCEPTANCE

I (or we) agree to sell the above described property on the terms and conditions herein stated and agree to pay the above signed Broker as fee the sum of Seven percent of selling price DOLLARS (\$ 7% of S.P.) Or one half (1/2) the deposit in case same is forfeited by the pur-

chaser, provided same shall not exceed the full amount of the fee.

50% to Ed Thirkhill Realty: 50% to Ed Post Rlty
(Cammarata) Realty; MLS fees to be deducted from gross commissions.

DATED Nov 20, 19 74

SELLER Estate of Flora Holman, Deceased

SELLER /s/ by Edgar Hash atty for Wanda Yates
P.R.

Address (Illegable) Phx 85002

Phone 257-0211

☐ SCOTTSDALE (Home Office) ☐ COMMERCIAL DIVISION

4535 N. Scottsdale Rd

4535 N. Scottsdale Rd

Scottsdale - 947-4266

Scottsdale 945-9577

☒ PHOENIX

☐ WEST PHOENIX

4742 N.CENTRAL AVE.

5040 N. 35th AVENUE

Phoenix - 264-4933

Phoenix - 939-1431

☐ TEMPE

☐ MESA

2100 S. Rural RD

615 E.UNIVERSITY DR.

Tempe - 966-6221

Mesa - 964-8788

☐ NORTHWEST PHOENIX

☐ SUN CITY-YOUNGTOWN

3518 W. CACTUS RD

11123 W. NEVADA

Phoenix - 938-6500

Youngtown -977-4233

□ PARADISE VALLEY

3226 E. CACTUS RD

Phoenix - 992-3510

THIS IS A LEGALLY BINDING CONTRACT: IF NOT
UNDERSTOOD SEEK COMPETENT ADVICE

(Reverse side not reproduced)

STATE OF ARIZONA)
) SS
 COUNTY OF MARICOPA) Courtesy Recording
) Minnesota Title Company
) No Title Company
 JAN 30 1975 2:45 Liability

I hereby certify that the within instrument was
 filed and recorded in DOCKET 11016 pg 533-534
 and indexed in Mortgages, at the request of

State Investment Fee No. 20851
 Witness my hand and Compared
 official seal TOM Photostated
 FREESTONE County Fee 2.00
 Recorder PAUL-N-MARSTON

By /s/ Larry Ong Deputy Recorder

When recorded, mail to:
Title Insurance Co. of Minn.
700 E. Baseline
Tempe, Arizona

FOR COLLECTION N) 351,715 NO TITLE LIABILITY

REALTY MORTGAGE

KNOW ALL MEN, That

I, RICHARD ROWE, husband of Barbara A. Rowe
 of Maricopa County, Arizona, hereinafter re-
 ferred to as MORTGAGOR, in consideration of
 NINE THOUSAND NINE HUNDRED NINEY AND 42/100-
 DOLLARS, in hand paid by STATE INVESTMENT
 CORPORATION, an Arizona corporation, herein-
 after referred to as MORTGAGEE, the receipt
 whereof is hereby acknowledged, does hereby

grant, bargain, sell and convey to MORTGAGEE, and the successors, heirs and assigns of MORTGAGEE forever, the following real estate, lying and being in the County of Maricopa and the State of Arizona, known and described as Lot 4, WILLIAMS PLACE, according to Book 6 of Maps, page 2, records of Maricopa County, Arizona.

Together with all rents, issues and profits thereof and all rights and privileges appurtenant or to become appurtenant to said land, including but not limited to any application for water rights for all or any portion of said lands in the Salt River Project of the United States Reclamation Service, and all the rights to the use of water and ditches for the irrigation of said premises to which MORTGAGOR or said premises are now or may hereafter become entitled, and also together with all the share of, or subscription rights to the capitol stock of the Salt River Valley Water Users Association appurtenant or to become appurtenant to said premises:

TO HAVE AND TO HOLD the above described premises with all the privileges and appurtenances thereunto belonging, including all rents, issues and profits thereof unto MORTGAGEE, and the successors, heirs, executors, administrators or assigns of MORTGAGEE forever. And MORTGAGOR hereby covenants that MORTGAGOR is well and truly seized of a good and perfect title to the premises above conveyed in the law, in fee simple and has good right and lawful authority to convey the same, and that the title so conveyed is clear, free and unencumbered and that MORTGAGOR will forever warrant and defend the same to MORTGAGEE against all claims whatsoever

PROVIDED ALWAYS, and these presents are upon this express condition, that if MORTGAGOR shall pay to MORTGAGEE, the just and full sum of NINE THOUSAND NINE HUNDRED NINETY AND 42/100 ---- Dollars, with interest thereon, according to the terms and conditions of that certain promissory note bearing even date herewith executed by R. RICHARD ROWE, husband

of Barbara Rowe and payable to the order of said MORTGAGEE and shall moreover pay to the proper officers all taxes and assessments, general or special, which shall be levied or assessed upon said real estate on or before the date when such taxes or assessments shall have become delinquent and insure and keep insured the buildings on said premises against loss or damage by fire, in the sum of NINE THOUSAND NINE HUNDRED NINETY AND 42/100----- Dollars, in insurance companies to be selected by MORTGAGEE, and the policies of insurance assigned or made payable to MORTGAGEE as interest of MORTGAGEE may appear, and deliver the said policies to the MORTGAGEE, until payment in full of the said promissory note, and interest thereon, then these presents shall be null and void. But in case of the non-payment of any sum of money either principal, interest, taxes, assessments, assessments and dues for irrigation water, power bills, or premiums of insurance, at the time or times when the same shall become due or delinquent

as aforesaid or upon the failure of MORTGAGOR to insure the buildings upon said premises and keep the policies assigned or made payable to MORTGAGEE, and deliver the said policies to the MORTGAGEE agreeable to the conditions of these presents, or of the aforesaid promissory note or any part thereof, or in case of the failure of MORTGAGOR to keep or perform any other agreement, stipulation or condition herein contained, then in such case the whole amount of said principal sum shall be at the option of MORTGAGEE, deemed to have become due and the same, with interest thereon at the rate contracted shall thereupon be collectable in a suit at law or by foreclosure of this mortgage in the same manner as if the whole of said principal sum had been made payable at the time when any such failure shall occur, as aforesaid.

And MORTGAGOR further covenants and agrees that in case of failure on the part of MORTGAGOR to pay any of said taxes, assessments

and dues for irrigation water, power bills, or premiums of insurance, as above provided MORTGAGEE may pay the same and the amount so paid, together with interest thereon at the rate of eight percent per annum shall be a part of the debt secured by this mortgage and a lien on said premises immediately due and payable at the option of MORTGAGEE.

MORTGAGOR also covenants and agrees with MORTGAGEE that MORTGAGOR will, during existence of this mortgage, neither permit nor commit waste on said premises; and will take the same care thereof that a prudent owner would take, and in any action to foreclose this mortgage a receiver shall, upon application of the plaintiff in such action and without notice to the defendants, be appointed by the Court to take charge of said property, to manage, carry on, protect, preserve and repair the same and receive and collect all the rents, issues and profits thereof, and apply the same to the payment of sums spent to protect, preserve and repair said property, the payment of taxes and other

charges, including his own compensation, and to the payment of said note and interest, which may be due or become due during the pendency of the action until sale be finally made and deed made and delivered thereunder; and in case of such foreclosure MORTGAGOR will pay to MORTGAGEE in addition to the taxable costs of the foreclosure suit, a reasonable amount additional as attorney's fee, together with a reasonable fee for title search made in preparation and conduct of such suit, which shall be a lien on said premises and secured by this mortgage; and in case of settlement after suit is brought but before trial, MORTGAGOR agrees to pay a reasonable attorney's fee, as well as all of the cost of such suit and the costs of the appointment of a receiver, if appointed, and any sums expended by such receiver or the MORTGAGEE in the management, carrying on, protection, preservation and repair of said property.

The covenants and agreements herein contained shall inure to the benefit of and be

binding upon the heirs, executors, administrators successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the MORTGAGOR has hereunto set his hand this 22 day of November, 1974.

/s/R. Richard Rowe

State of Arizona)
)
County of Maricopa) ss

On this, the 22 day of November, 1974 before me, J. Moraga the undersigned officer, personally appeared R. Richard Rowe known to me (or satisfactorily proven) to be the person whose name subscribed to the within instrument and acknowledged that he executed the same for the purpose therein contained.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

/s/ J. Moraga

Notary Public

My Commission Expires 1-12-76

TITLE INSURANCE COMPANY OF MINNESOTA

DKT 1101 PG 747

ASSIGNMENT

State Investment Corporation, an Arizona corporation, herein referred to as Assignor, for and in consideration of \$9,990.42, receipt of which is hereby acknowledged, does hereby assign to Wanda Yates, Personal Representative of Estate of Flora Holman, deceased, through Minnesota Title, Collection No. 251715, that certain mortgage made and executed on the 22nd day of November, 1974, by R. Richard Rowe, husband of Barbara A. Rowe, Mortgagor, to State Investment Corporation, an Arizona corporation, and recorded in the office of the Maricopa County Recorder on the 30th dat of January, 1975 in Docker 11016 at pages 533 and 534 thereof, covering the following described premises, to wit: Lot 4, Williams Place together with the note described in such mortgage, and the money due and to become due thereon with interest; but on the express condition that if Assignor, or its assigns, shall pay or cause to be paid to Assignee, its heirs and assigns the sum of \$9,990.42 in

monthly payments of \$105.00 per month including interest thereon at the rate of 7 1/2 per cent per annum from December 20, 1974, payable on the first day of each month, this Assignment shall be void; it being made for the sole purpose of securing the payment of such sum of \$9,990.42 with interest thereon as herein specified.

DATED this 20th day of December, 1974.

STATE INVESTMENT CORPORATION

By /s/ R. Richard Rowe

STATE OF ARIZONA)
) ss.
County of Maricopa)

R. RICHARD ROWE, being first duly sworn, acknowledges that he is the President of State Investment Corporation, an Arizoan Corporation, and that he is duly authorized to execute the above document for the purposes contained therein.

~~XXXXXXXXXXXX~~

SUBSCRIBED AND SWORN to before me this 14th day of February, 1975.

My Commision /s/ J. Moraga
Expires: 1-12-76

STATE OF ARIZONA)
) ss
County of Maricopa)

I hereby certify that the within
instrument was filed and recorded at
request of

Edgar Hash

FEB 20, 1975 - 10:25

in Docket 11040

on page 747-748

Witness my hand and official
seal the day and year aforesaid

Tom Freestone

County Recorder

By R Brook
Deputy Recorder

2.00

65a

OFFICE DISTRIBUTION
APPEALS
BONDS REFUND
FORFEITURE
CHANGE OF VENUE
JURY FEES
REMANDS
SENTENCING

IN THE SUPERIOR COURT
of
MARICOPA COUNTRY, STATE OF ARIZONA

25 Nov. 16, 1979 HONORABLE STANLEY Z. GOODFARB
Div DATE JUDGE OR COMMISSIONER

WILSON D. PALMER Clerk
M. Adair Deputy

C 349188

AMERICAN SAVINGS LIFE Gove L. Allen
INSURANCE COMPANY

vs.

Robert E. Kersting

STATE INVESTMENT
COMPANY et al

Egar Hash

David R. Postal

This is the time set for hearing
Defendant, Jonathan L. Haas, Motion for
Summary Judgment. The Court is advised
that a stipulation of counsel has been
reached and no one will appear this date.

Pursuant to said stipulation,

IT IS ORDERED granting Summary
Judgment in favor of the Defendants,

66a

Jonathan L. Haas and Hiroe Haas in the sum
of \$65.00. Counsel for defendants Haas shall
prepare a Judgment and submit same to the
Court for signature.

Mail Distribution Center

Received: JAN 10 1980

Processed: JAN 11 1980 Page 9

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

AMERICAN SAVINGS LIFE)
INSURANCE COMPANY,)

Plaintiff,)

vs.)

No. C 349188

STATE INVESTMENT)
CORPORATION, et al,)

SUMMARY JUDGMENT

Defendants,)

WANDA YATES, Personal)
Representative of the)
Estate of Flora Holman,)
Deceased,)

Third Party)
Plaintiff,)

vs.)

JONATHAN L. HAAS and)
HIROE HAAS, husband)
and wife,)

Third Party)
Defendants.)

The Motion of Third Party Defendants HAAS
for summary judgment filed herein pursuant to
Rule 56 of the Arizona Rules of Civil
Procedure, coming for hearing before the Court

on the 16th day of November, 1979, and it appearing to the Court that proper service of said Motion for Summary Judgment was made; and the Court having jurisdiction of the parties to the proceedings and the subject matter; and the Court finding that Defendants HAAS Motion for Summary Judgment should be granted for the reason that there appears to be no genuine issue as to any material fact as between Third Party Plaintiff and Third Party Defendants HAAS and that the Third Party Defendants HAAS are entitled to summary judgment as prayed for in said Motion; and it further appearing there is no just reason for delay in the entry of judgment and that such judgment should enter forthwith.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Third Party Defendants HAAS Motion for Summary Judgment is granted and that Third Party Plaintiffs action against Third Party Defendants JONATHAN L. HAAS and HIROE HAAS is dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND

DECREED that Third Party Defendants have judgment in the sum of \$65.00 as and for costs, with interest thereon at the rate of 6% per annum from daid (sic) until paid.

DONE IN OPEN COURT this 9th day of
January 1980
~~December, -1979.~~

/s/Stanley Z. Goodfarb
Judge of the Superior Court

Copy of the foregoing mailed
this 1st day of December, 1979,
to:

Clerk of the Superior Court
201 West Jefferson
Phoenix, Arizona

The Honorable Stanley Z. Goodfarb
Superior Court, Division 25
201 West Jefferson
Phoenix, Arizona 85003

Edgar Hash
637 North 3rd Avenue
Phoenix, Arizona 85003

/s/ Debra Lyman
Debra Lyman

OFFICE DISTRIBUTION
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BONDS REFUND
FORFEITURE
CHANGE OF VENUE
JURY FEES
REMANDS
SENTENCING

IN THE SUPERIOR COURT
 of
 MARICOPA COUNTY, STATE OF ARIZONA

25 January 9, 1980 HON. STANLEY Z. GOODFARB
Div DATE JUDGE OR COMMISSIONER

WILSON D. PALMER Clerk
 Emily Martinez Deputy

C-349188

AMERICAN SAVINGS LIFE Gove L. Allen
 INSURANCE COMPANY

Robert E. Kersting

vs.

Edgar Hash

STATE INVESTMENT
 CORPORATION, et al

David R. Postal

IT IS ORDERED that Third Party
 Defendants Haas Motion for Summary
 Judgment is granted and that Third Party
 Plaintiffs action against Third Party
 Hass is dismissed with prejudice, all in
 accordance with the formal written
 Summary Judgmnet presented to the Court

71a

and signed January 8, 1980.

FILED:Summary Judgment

MAIL DISTRIBUTION CENTER

Received: Jan 10 1980

Processed: Jan 11 1980

Page 17

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 IN AND FOR THE COUNTRY OF MARICOPA

| | | |
|------------------------------|---|-------------------|
| AMERICAN SAVINGS LIFE |) | No. C-349188 |
| INSURANCE COMPANY |) | |
| vs. |) | MOTION TO CORRECT |
| |) | JUDGMENT AND |
| |) | NOTICE |
| STATE INVESTMENT CORPORATION |) | (Oral Argument |
| et al |) | Requested) |

NOW COMES EDGAR HASH, attorney for the
 Wanda Yates
 Personal Representative/and moves this Court
 to correct the formal judgment signed by this
 court ostensibly on January 8, 1980 according
 to minute entry of January 9, 1980 from Divi-
 sion 25, and to make judgment conform with
 the minute entry entered by the Honorable
 Stanley Goodfarb on November 16, 1979, pursu-
 ant to Rules of Civil Proceedure, Rule 60 and
 Rule 58 and the pleadings in this case. Notice
 is hereby given that this motion will be urged
 at the next regular call of the calander

/s/ Edgar Hash
 EDGAR HASH
 637 North Third Avenue
 Phoenix, Arizona 85003

M E M O R A N D U M

Pursuant to affidavit of EDGAR HASH attached hereto, the court was advised of a stipulation for judgment to be entered for the amount of costs, only, with no reflection as to findings or specific ruling on the merits. The minute entry states:

"This is the time set for hearing Defendant, Jonathan L. Haas' Motion for Summary Judgment. The Court is advised that a stipulation of counsel has been reached and no one will appear this date.

Pursuant to said stipulation,

IT IS ORDERED granting Summary Judgment in favor of the Defendants, Jonathan L. Haas and Hiroe Haas in the sum of \$65.00. Counsel for defendants Haas shall prepare a Judgment and submit same to the Court for signature."

(See Attached Copy)

Contrary to the minute entry, defendant's counsel prepared a more formal form of a judgment which seems to imply that the court was considering the merits of the case after argument. The only relief granted was for judgment for the defendant and costs, all pursuant to a stipulation as set out in the

minute entry. The form of the judgment did not require lodging under Rule 58(d) since it was for costs and denial of relief. The differences were not noticed until after defendant Haas filed a complaint for malicious prosecution against Third Party Plaintiff's counsel two days following the entry of judgment. Rule 60 clearly allows correction of typographical errors, and the year of entry is incorrect. Rule 60(c) allows relief for mistakes or inadvertance and certainly to require the form of judgment to comply with the minute entry is no more than a technical correction so that the record is complete.

The judgment should be reformed accordingly.

Respectfully submitted,

/s/ Edgar Hasg
EDGAR HASH

Copy of foregoing mailed this
5th day of February, 1980, to:

David R. Postal
3709 W. Marten
Phoenix, Arizona 85021

A F F I D A V I T

STATE OF ARIZONA)
) ss.
 County of Maricopa)

EDGAR HASH, being duly sworn upon his oath deposes and says that he is attorney of record in this matter; that following receipt of a minute entry from the court on October 26, 1979 setting hearing on argument of defendant's motion for summary judgment on November 16, he called David Postal, Haas' attorney, and informed him that the Third Party Plaintiff Yates did not wish to proceed with the litigation as Minnesota Title Company had compensated the Estate for the loss caused by the defendant Haas. That Postal, on November 14, 1979, agreed to enter a summary judgment in favor of his client for costs, only, and no attorney fees and that Postal thereafter advised affiant that the costs were as follows, to-wit:

| | |
|---------------------|----------------|
| Deposition Per Diem | \$45.00 |
| Clerk's Answer Fee | <u>\$20.00</u> |
| | \$65.00 |

That the court was so advised of the stipulation and the minute entry of November 16, 1979 resulted.

That thereafter a formal judgment was presented which differed materially in language from the minute entry, and left an impression that disposition was on the merits after argument. That the form of said judgment was not discovered until this date and that the year on said judgment is incorrect.

/s/ Edgar Hash
Affiant

SUBSCRIBED AND SWORN to before me this 5th day of February, 1980.

My Commission Expires: /s/ Suzanna Coat
Notary Public
July 5, 1983

David R. Postal, Esq.
 Law Offices of Robert W. Holland
 3550 North Central Avenue
 1108 United Bank Building
 Phoenix, Arizona 85012

Attorney for Defendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 IN AND FOR THE COUNTY OF MARICOPA

AMERICAN SAVINGS LIFE)
 INSURANCE COMPANY,)
)
 Plaintiff,)

vs.)

NO. C-349188

STATE INVESTMENT)
 CORPORATION, et al,)
)
 Defendant.)

RESPONSE TO MOTION TO
 CORRECT JUDGMENT AND
 NOTICE

JONATHAN HAAS, through his undersigned
 attorney, hereby opposes the Motion to Cor-
 rect Judgment and Notice.

/s/ David R. Postal

DAVID R. POSTAL

MEMORANDUM OF POINTS AND AUTHORITIES

The Judgment prepared for the Court and
 entered in this matter is totally in compli-
 ance with the Court's minute entry and the

motions the Court had before it.

On the 16th of October, 1979, a Motion for Summary Judgment was submitted by DAVID POSTAL, attorney for JONATHAN HAAS. The Motion included a prayer for relief that summary judgment be granted, that the Court award costs, and that the Court award attorneys's(sic) fees to Defendant HAAS.

This Motion was unopposed and the Court set a hearing date of November 16, 1979.

Pursuant to the Affidavit of Counsel attached hereto, Edgar Hash informed David Postal he had no objections to the taking of Summary Judgment based on the authority cited, but would not stand for attorneys fees.

Mr. Hash also indicated that he would allow costs to be assessed against his client in this Summary Judgment.

The minute entry of the Court dated November 16, 1979 accurately reflects that Stipulation, and the Summary Judgment is an entirely proper form of Summary Judgment,

which was mailed to Edgar Hash on the first day of December, 1979.

No objections to the form of Judgment were entered and the Court appropriately entered Judgment on the form presented on January 8, 1980 and filed the same on January 9, 1980.

It is respectfully submitted that if the date is improper on the Judgment that it may be corrected under Rule 60, but that the Affidavit of Edgar Hash does not indicate any mistake, inadvertence, surprise or other reasons for his failure to review the Judgment and state any objections as to the form he may have had.

Furthermore, no where does the Affidavit of Edgar Hash or pleadings moving to correct the Judgment ~~de-net~~ state where the Summary Judgment actually differs from the minute entry or is otherwise not in conformance with the parties.

WHEREFORE, if there is any incorrect date on the Summary Judgment as respectfully submitted that the date be corrected, but that the substance of the Summary Judgment as entered by the Court be allowed to stand.

RESPECTFULLY SUBMITTED this 19th day of February, 1980.

/s/ David R. Postal
DAVID R. POSTAL
 Attorney for Jonathan
 Haas

Copy of the foregoing mailed this
 19th day of February, 1980. to:

Edgar Hash
 637 North Third Avenue
 Phoenix, Arizona 85003

/s/ Lorraine Vesta

A F F I D A V I T

STATE OF ARIZONA)
) ss.
County of Maricopa)

DAVID R. POSTAL, being first duly sworn
upon his oath, deposes and says:

I am the attorney of record on this matter;
that following the receipt of a Minute Entry
from the Court in October of 1979 setting a
hearing date for Defendant Haas's Motion for
Summary Judgment on November 16, 1979 he
received a call from Edgar Hash, that the
tender of the call was that Hash did not wish
to fight the motion for Summary Judgment if
Haas would waive attorneys' fees in the matter.

That pursuant to that agreement Postal
agreed to enter a Summary Judgment on the favor
of his client for costs without attorneys' fees
and advised affiant that the costs were \$45.00
for a deposition and \$20.00 for answering fees,
for a total of \$65.00.

That the Court was advised of the
Stipulation and a minute entry of November 16th

resulted.

That a formal Summary Judgment was prepared, the original being mailed to the Honorable Stanly(sic) Z. Goodfarb, with copies to the Clerk of the Court and Edgar Hash on December 1, 1979.

That the Summary Judgment was signed on January 8, 1980 and filed pursuant to the Court's minute entry of January 9, 1980.

/s/David R. Postal
DAVID R. POSTAL

SUBSCRIBED AND SWORN to before me this
19th day of February, 1980.

/s/Linda A. Mezyesi
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Jan.31,1983

OFFICE DISTRIBUTION

MAR 6 1980

APPEALSBONDS REFUNDFORFEITURECHANGE OF VENUEJURY FEESREMANDSSENTENCING

IN THE SUPERIOR COURT
 Of
 MARICOPA COUNTY, STATE OF ARIZONA

| | | |
|------------|----------------------|---------------------------------|
| <u>25</u> | <u>March 3, 1980</u> | <u>HON. STANLEY Z. GOODFARB</u> |
| <u>Div</u> | <u>DATE</u> | <u>JUDGE OR COMMISSIONER</u> |

WILSON D PALMER Clerk
 M. Jelsma Deputy

349188

AMERICAN SAVINGS & LIFE
 INSURANCE COMPANY

VS

STATE INVESTMENT CORPORATION
 ET AL

Gove L. Allen

Edgar Hash

Robert E. Kersting

David R. Postal

This is the time set for hearing on motion of Personal Representative, Wanda Yates, to correct the judgment filed on behalf of Jonathan Haas. Personal Representative is represented by Edgar Hash; Defendant Haas is represented by counsel, David Postal. No

Court Reporter is present.

The Court having considered the motion and having reflected upon its own recollection of the hearing on motion for summary judgment agrees with the motion of the Personal Representative Yates. There was a stipulation for the granting of summary judgment upon the payment of costs of \$65.00. There was no determination on the merits, and the stipulation indicated that such was not to be done. Moreover, the judgment submitted was not lodged under Rule 58(d) even though the judgment was written in a substantially more formal wording than as agreed by the parties or contemplated by the Court.

There was contained in the judgment a specific finding on the merits which this Court did not do. Further, it appears that no copy of the proposed judgment was ever received by counsel, Hash.

This determination has now been utilized by the Defendants Haas as the basis for a

malicious prosecution action.

In order to conform with the stipulation of counsel,

IT IS ORDERED granting motion of Personal Representative Yates to correct the judgment. Counsel Hash will prepare and submit to the Court a corrected judgment in conformity with the Court's order.

MAIL DISTRIBUTION CENTER

Received: MAR 4 1980

Processed: MAR 4 1980

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTRY OF MARICOPA

| | | |
|----------------------------------|---|-------------|
| AMERICAN SAVINGS LIFE |) | |
| INSURANCE COMPANY, |) | |
| |) | NO.C-349188 |
| Plaintiff, |) | |
| vs |) | CORRECTED |
| |) | JUDGMENT |
| STATE INVESTMENT CORPORATION, |) | |
| et al |) | (Assigned |
| Defendants, |) | to Judge |
| |) | Goodfarb, |
| |) | Div. 25) |
| <hr/> | | |
| WANDA YATES, Personal Repre- |) | |
| sentative of the Estate of |) | |
| Flora Holman, Deceased |) | |
| |) | |
| Third Party Plaintiff, |) | |
| vs. |) | |
| |) | |
| JONATHAN L. HAAS and HIROE HAAS, |) | |
| husband and wife, |) | |
| |) | |
| Third Party Defendants.) |) | |
| <hr/> | | |

The motion of Wanda Yates, Personal Representative of the Estate of Flora Holman, to correct the formal written judgment entered herein on January 9, 1980, filed on behalf of Jonathan Haas, having been filed and come on regularly for hearing with counsel for the Personal Representative, Edgar Hash, and counsel for the Defendants Haas, David Postal, present,

and the Court having heard argument by counsel,

The Court, having considered the motion and having reflected upon its own recollection of the hearing on motion for summary judgment, agrees with the motion of the Personal Representative Yates, and finds that:

There was a stipulation by counsel for the granting of the summary judgment upon the payment of costs of \$65.00 and that there was no determination of the motion on the merits, and the stipulation indicated that such was not to be done. Moreover, the judgment submitted was not lodged under Rule 58(d) even though the judgment was written in a substantially more formal wording than as agreed by the parties or contemplated by the Court.

The Court further finds that there was contained in the judgment presented a specific finding on the merits which this Court did not do. Further, it appears that no copy of the proposed judgment was ever received by counsel, Hash.

It further appears that this determination has now been utilized by the Defendants Haas as the basis for a malicious prosecution action.

IT IS, THEREFORE, ORDERED granting the motion of Wanda Yates, Personal Representative of the Estate of Flora Holman, Deceased, for a corrected judgment.

IT IS FURTHER ORDERED setting aside the formal written Judgment heretofore made and entered on January 9, 1980.

IT IS FURTHER ORDERED, in conformity with the said stipulation and agreement of counsel, that the Defendants Jonathan L. Haas and Hiroe Haas have judgment against the Personal Representative of the Estate of Flora Holman, Deceased, in the sum of \$65.00 as and for court costs.

DONE IN OPEN COURT this 3 day of April, 1980.

/s/ Stanley Z. Goodfarb
Judge

89a

Lodged with the Court this
20 day of March, 1980.

Copy mailed this 20 day
of March, 1980, to:

DAVID R. POSTAL

3550 N. Central - Suite 1108

Phoenix, Arizona 85012

Attorney for Third Party Defendants

AMERICAN SAVINGS LIFE
INSURANCE COMPANY

NO.C-349188

vs

CORRECTED
JUDGMENT

STATE INVESTMENT CORPORATION,
et al

EDGAR HASH

EDGAR HASH

637 North Third Avenue

Phoenix, ARizona 85003

Attorney for Personal Representative

Wanda Yates, of the Estate of Flora

Holman, Deceased

Third Party Plaintiff

David R. Postal
 LAW OFFICES OF ROBERT W. HOLLAND
 3550 North Central Avenue
 Suite 1108
 Phownix, Arizona 85012
 (602) 264-2712

Attorneys for Third Party Defendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 IN AND FOR THE COUNTY OF MARICOPA

AMERICAN SAVINGS LIFE
 INSURANCE COMPANY,

Plaintiff,

vs.

STATE INVESTMENT
 CORPORATION, et al.,

Defendants.

No. C-349188

OBJECTION TO
 FORM OF
 JUDGMENT

WANDA YATES, Personal
 Representative of the
 Estate of Flora Holman,
 deceased,

Third Party Plaintiffs,

vs.

JONATHAN L. HAAS and HIROE
 HAAS, husband and wife,

Third Party Defendants.

The purposed corrected Judgment submitted
 to the Court on March 20, 1980 by Edgar Hash,

goes beyond correcting a Judgment to a recitation of facts that is unnecessary.

It is respectfully submitted that the last paragraph is the only one necessary for the corrected Judgment. Furthermore, it is respectfully submitted that this counsel never stipulated to anything other than a summary judgment against defendant Flora Holman(sic) and a dollar judgment of \$65.00 for costs.

Counsel has no problem with the Court exercising whatever language(sic) it finds objectionable as to the findings of the Court, however, it is respectfully submitted that the stipulation was that summary judgment would not be argued if Haas would waive attorney fees and accept \$65.00 as and for costs.

That the Court finds the original Judgment entered to be beyond that scope is understandable but the proposed corrected Judgment is beyond the scope of correcting a Judgment, and should be limited to correcting a form of Judgment by setting aside the formal

written Judgment made on January 9, 1980 and ordering that Jonathan L. Haas and Hiroe Haas have judgment against the Personal Representative for the Estate of Flora Holman, deceased, that all claims against Haas are dismissed by the Judgment and a Judgment in the sum of \$65.00 as and for Court costs.

Respectfully submitted this 28th day of March, 1980.

LAW OFFICES OF ROBERT W. HOLLAND

By /s/David R. Postal
David R. Postal
Attorneys for Third Party
Defendants

Copy of the foregoing mailed
this 28th day of March, 1980, to:

Edgar Hash, Esq.
637 North Third Avenue
Phoenix, Arizona 85003
Attorney for Personal Representative
Wanda Yates, of the Estate of Flora
Holman, deceased, Third Party
Plaintiff

/s/

OFFICE DISTRIBUTION

| |
|-----------------|
| APPEALS |
| BONDS REFUND |
| FORFEITURE |
| CHANGE OF VENUE |
| JURY FEES |
| REMANDS |
| SENTENCING |
| Microfilm |

IN THE SUPERIOR COURT
of
MARICOPA COUNTY, STATE OF ARIZONA

| | | |
|-----|----------------|--------------------------|
| 25 | April 14, 1980 | HON. STANLEY Z. GOODFARB |
| Div | DATE | JUDGE OR COMMISSIONER |

WILSON D. PALMER Clerk
E.Schneider Deputy

C 349188

Gove L. Allen

AMERICAN SAVINGS LIFE
INSURANCE

Edgar Hash

David R. Postal

vs.

STATE INVESTMENT CORP.

The Objection to Form of Judgment filed by the 3rd Party Defendant, Haas, dated March 28, 1980, is granted to the extent that there is struck from the corrected Judgment signed April 3, 1980 the following language:

Page 1, lines 27-28 - "agrees with the motion of the of the(sic) Personal Representative Yates"

Page 2, line 1 through 11.

The Court makes the corrections on the Judgment in the file, initials the same and the Clerk of the Court is instructed to remicrofilm the Corrected Judgment and show the same as the Judgment appropriate in this case.

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Received: APR 15 1980

Processed: APR

Page 21

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

AMERICAN SAVINGS LIFE
INSURANCE COMPANY,

Plaintiff

vs

STATE INVESTMENT CORPORATION,
et al,

Defendants,

WANDA YATES, Personal Represent-
ative of the Estate of Flora
Holman, Deceased,

Third Party Plaintiff,

vs.

JONATHAN L. HAAS and HIROE HAAS,
husband and wife,

Third Party Defendants.

NO.C-349188

CORRECTED
JUDGMENT

(Assigned
to Judge
Goodfarb
Div 25)

The motion of Wanda Yates, Personal Representative of the Estate of Flora Holman, to correct the formal written judgment entered herein on January 9, 1980, filed on behalf of Jonathan Haas, having been filed and come on regularly for hearing with counsel for the personal Representative, Edgar Hash, and counsel for the Defendants Haas, David Postal, present

and the Court having heard argument by counsel,

The Court, having considered the motion and having reflected upon its own recollection of the hearing on motion for summary judgment, agrees-with-the-motion-of-the-Personal-Representative-Yates, and finds that:

There was a stipulation by counsel for the granting of the summary judgment upon the payment of costs of \$65.00 and that there was no determination of the motion on the merits, and the stipulation indicated that such was not to be done. Moreover-the-judgment-submitted-was-not-logged-under-Rule-58-(d)-even-though--the-judgment-was-written-in-a-substantially-more-formal- wording-than-as-agreed-by-the-parties-or-contemplated-by-the-Court--

The-Court-further-finds-that-there-was-contained-in-the-judgment-presented-a-specific-finding-on-the-merits-which-this-Court-did-not-do--Further,-it-appears-that-no-copy-of-the-proposed-judgment-was-ever-received-by-counsel Nash-

~~It-further-appears-that-this-determina--
tion-has-now-been-utilized-by-the-Defendants-
Haas-as-the-basis-for-a-malicious-proseecution
action.~~

IT IS, THEREFORE, ORDERED granting the motion of Wanda Yates, Personal Representative of the Estate of Flora Holman, Deceased, for a corrected judgment.

IT IS FURTHER ORDERED setting aside the formal written Judgment heretofore made and entered on January 9, 1980.

IT IS FURTHER ORDERED, in conformity with the said stipulation and agreement of counsel, that the Defendants Jonathan L. Haas and Hiroe Haas have judgment against the Personal Representative of the Estate of Flora Holman, Deceased, in the sum of \$65.00 as and for court costs.

DONE IN OPEN COURT this 3 day of April 1980.

/s/ Stanley Z. Goodfarb

Lodged with the Court this

20 day of March, 1980

Copy mailed this 20 day
of March 1980, to:

DAVID R. POSTAL

3550 N. Central - Suite 1108

Phoenix, Arizona 85011

Attorney for Third Party Defendants

AMERICAN SAVINGS LIFE
INSURANCE COMPANY,

NO.C-349188

CORRECTED
JUDGMENT

vs

STATE INVESTMENT CORPORATION.
et al

EDGAR HASH

EDGAR HASH

637 North Third Avenue

Phoenix, Arizona 85002

Attorney for Personal Representative

Wanda Yates, of the Estate of Flora

Holman, Deceased

Third Party Plaintiff

99a

Law Offices of
Robert W. Holland

3550 North Central Avenue, Suite 1108
Phoenix, Arizona 85012
Tel. (602) 264-2713

Robert W. Holland
David R. Postal
Douglas W. Burns

March 5, 1980

Honorable Judge Goodfarb
Superior Court Building
201 West Jefferson
Phoenix, Arizona 85003

HAND-DELIVERED

Dear Judge Goodfarb:

Lest you think ill of the tactics and measures that I used in the American Savings and Life vs. State Investment matter, I think you should be appraised of the following.

In February of 1978 I received answers to interrogatories from Wanda Yates, the third party plaintiff in this action.

Those answers together with my client's protestation that he had done nothing wrong lead to my digging for the truth in the Complaint.

By June of 1978, I had determined that Mr. Hash had in fact been the one who accepted the offer made, had later gone back and demanded, received, and prepared the instruments for additional security, all outside of the knowledge of my client the third party defendant.

Based on that knowledge I contacted Mr. Hash by telephone, and informed him that I believed his law suit was without basis, that I felt continuation of this matter would result in abuse of process, malicious prosecution action being brought against him, and with my client's permission offered to stipulate a settlement for a mutual stipulation to dismiss the action at that time, no further ratifications on either side.

Mr. Hash rejected out of hand this offer for a stipulated dismissal, and when it was determined that Mr. Rowe was seriously ill, a Notice of his deposition was taken in order to preserve his testimony. Mr. Hash attended the deposition of Mr. Rowe at which time a record pertaining to the transactions between

Mr. Rowe and Mr. Hash was made. Mr. Rowe has subsequently died.

Motion for Summary Judgment in the Yates matter was made in October, 1979, the Court properly setting a hearing date.

At no time did I authorize a Stipulation of Dismissal in this matter, but did stipulate I would not go after attorney's fees and seek only \$65.00 in costs, as my letter of November 13, 1979 to Edgar Hash relating to costs stated.

That Mr. Hash did not receive a copy of my formal judgment seems peculiar, but is not impossible with todays mail.

It is my belief that the form of Summary Judgment entered was entirely proper, but that if the Court deems that on equity Mr. Hash has the right to set aside the judgment then it should be set aside and not changed.

Even the Memorandum of Points and Authorities by Hash indicate that "the only relief granted was for judgment for the defendant and costs. . .". Further, the

minute entry called for a formal written judgment to be prepared and submitted to the Court for signature, contrary to the protestations of Hash that under Rule 58(d) a formal judgment would not be required.

I have not, nor have I attempted to go behind the back of Mr. Hash, having informed him over a year and a half prior to the entry of judgment that my client intended to pursue his legal rights against Yates, and Mr. Hash.

Respectfully submitted,

/s/David R. Postal

DAVID R. POSTAL

DRP:la

cc: Edgar Hash
637 North Third Avenue
Phoenix, Arizona 85003

103a

DAVID R. POSTAL
Attorney and Counselor
4025 NORTH 16th ST.
SUITE B
PHOENIX, ARIZONA 85016
PHONE 602/248-0763

November 13, 1979

Edgar Hash, Esq.

P.O. Box 25278

Phoenix, Arizona 85002

Dear Mr. Hash,

RE: Yates v. Haas

Haas' costs include \$45.00 fee for
deposition and a \$20.00 answering fee.

Sincerely,

sig/ David R. Postal

DRP/dl

Supreme Court, U.S.
FILED

JAN 26 1983

Alexander L. Stevas, Clerk

No. 82-1125

In The
Supreme Court of the United States

October Term, 1982

JONATHAN L. HAAS,
Petitioner
vs.

EDGAR HASH and ELAINE HASH,
Respondents

RESPONSE TO PETITION FOR CERTIORARI

W. Michael Flood
Jefferson L. Lankford
JENNINGS, STROUSS &
SALMON
111 West Monroe
Phoenix, AZ 85003
(602) 262-5911
Attorneys for
Respondents

January 24, 1983

QUESTIONS PRESENTED

1. Does the Supreme Court have jurisdiction under 28 U.S.C. § 1257(3) when no federal question was raised or decided by the state courts?

2. Should the Supreme Court review by certiorari an insubstantial federal claim first asserted in the petition for the writ of certiorari?

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OPINION BELOW

The opinion of the Arizona Court of Appeals in this case is an unreported memorandum decision. The text of the decision is reprinted in Petitioner's Appendix at 1a-11a.

JURISDICTION

Petitioner alleges that this Court's jurisdiction rests upon 28 U.S.C. § 1257(3). Respondents contend that jurisdiction is lacking, because no federal question was raised or decided in the courts below. The absence of jurisdiction is fully discussed in the argument section of this brief.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

28 U.S.C. § 1257:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

U.S. Const. Amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Jonathan L. Haas filed a malicious prosecution action in the Superior Court of Maricopa County, Arizona, against Wanda Yates and Respondents Edgar Hash and Elaine Hash.

Petitioner's malicious prosecution complaint alleged that respondent Edgar Hash, an attorney, had previously filed an action against petitioner for fraud on behalf of his client, Wanda Yates, as the executrix of an estate.

Petitioner Haas also alleged that the court had entered summary judgment in his favor in the fraud action, that attorney Hash had brought the action maliciously and without probable cause, and that Haas had been damaged as a result of the fraud action.

The summary judgment in the fraud action was a result of "a stipulation by counsel"^{1/} and was not a "determination of the motion [for summary judgment] on the merits," according to the judgment signed by the trial judge. (Petitioner's Appendix at 87a). The trial court record shows unequivocally that the entry of judgment was pursuant to an agreement of counsel. (Id. at 14a).

The parties filed cross-motions for summary judgment in the malicious prosecution action. The Superior Court granted respondents' motion and denied Haas'. The trial court held that there had been no "favorable determination" for Haas in the prior fraud action as

^{1/}Petitioner Haas was represented by counsel in the fraud action. He has represented himself in the malicious prosecution proceedings.

required by Arizona common law because the action had been terminated by a settlement agreement rather than on the merits.

The Arizona Court of Appeals affirmed, approving the trial court's definition of the state law requirements for malicious prosecution. Haas' petition for review in the Arizona Supreme Court was denied on September 28, 1982. No federal questions were presented by Petitioner Haas in the trial court, in his briefs filed in the Court of Appeals, or in his petition for review to the Arizona Supreme Court.

The petition for a writ of certiorari from this Court is dated December 24, 1982.

SUMMARY OF ARGUMENT

Because no federal question was presented to and decided by the courts below, no jurisdiction exists under 28 U.S.C. § 1257(3). Petitioner advanced only issues of state law in the state courts, and cannot argue for the first time in this Court that a federal right is involved.

Alternatively, petitioner's federal question is so insubstantial that the petition should be denied as a discretionary matter. No special or important reasons exist for granting the writ of certiorari. Petitioner argues that Arizona common law governing malicious prosecution denies his right to substantive due process. Arizona law holds when an action is terminated by negotiated agreement, no malicious

prosecution claim can be based on the action. Petitioner's due process argument is unsupported by any authority and is actually an argument about the wisdom of state law disguised by federal constitutional catchwords. Finally, the Arizona common law rests on a rational basis and does not violate due process.

ARGUMENT

I. JURISDICTION IS ABSENT BECAUSE NO
FEDERAL QUESTIONS WERE RAISED OR DECIDED
IN THE STATE COURTS.

Petitioner Haas invokes the
certiorari jurisdiction of this Court
under 28 U.S.C. § 1257(3), which allows
review of final judgments by the highest
state court in which a decision was
obtained. The statute provides that
jurisdiction exists only

where the validity of a treaty or
statute of the United States is
drawn in question or where the
validity of a State statute is
drawn in question on the ground of
its being repugnant to the
Constitution, treaties or laws of
the United States, or where any
title, right, privilege or
immunity is specially set up or
claimed under the Constitution,
treaties or statutes of, or
commission held or authority
exercised under, the United States.

Petitioner Haas argues for the first time in this Court that his federal right to due process of law was violated. (Petition at 16). As Petitioner concedes, he did not raise this or any other federal question in the Arizona courts and those courts did not decide any federal question. (See Petition at 14-15, stating questions raised and decided in Court of Appeals).

Since the federal question sought to be reviewed was neither presented nor decided in the state courts, certiorari jurisdiction is lacking. In Cardinale v. Louisiana, 394 U.S. 437 (1969), the Court dismissed a writ of certiorari for want of jurisdiction because petitioner had failed to assert any federal issue in the state courts. Justice White traced this rule to the early days of the Republic:

It was very early established that the Court will not decide federal constitutional issues raised here

for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet. 368, (1836), Justice Story . . . came to the conclusion that the Judiciary Act of 1789 . . . vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 394 U.S. at 438.

Even if Petitioner Haas is correct that a federal right was violated, jurisdiction is lacking unless he gave the state courts an opportunity to rectify the error. The Supreme Court

cannot review [a] final judgment, even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was "specially set up and claimed" in the state court as belonging to such party, under the Constitution, or some treaty, statute, commission, or authority of the United States. F.G. Oxley Stave Co. v. Butler County, 166 U.S. 648, 653 (1897) (dismissing writ of error for lack of jurisdiction).

This jurisdictional rule has been applied many times by this Court in "an unbroken line of precedent." Beck v.

Washington, 369 U.S. 541, 553 (1962) (citing cases). Since the rule that the Court reviews only those arguments presented to the State courts is not discretionary but jurisdictional, Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 334 (1968) (J. Harlan, dissenting), the petition in this case must be dismissed.

II. EVEN IF JURISDICTION EXISTED, REVIEW OF THE INSUBSTANTIAL CLAIM SHOULD BE DENIED.

Even if jurisdiction existed and review were possible, the petition should be denied as a matter of judicial discretion. The considerations which ordinarily warrant review on a writ of certiorari are missing from this case. No important question of federal law exists in this case, nor is there a conflict in the decision of a federal question between the courts below and

other courts. See Rule 17, Rules of the Supreme Court ("considerations governing review on certiorari"). Haas does not even discuss these considerations in his petition. Nor are there any objective indications that this case has particular importance. The Arizona Court of Appeals did not think the case important enough to publish its opinion. See generally, Rule 28(b), Arizona Rules of Civil Appellate Procedure.

Indeed, the federal question presented by Petitioner Haas is wholly insubstantial. He contends that he has a "right to substantive due process" which entitles him to pursue a malicious prosecution claim without being subjected to state common law requirements for proving such a claim. (Petition at 16). Petitioner cites not a single case from any jurisdiction which supports this unique view of the Federal Constitution.

The flimsiness of petitioner's argument is revealed by its quick degeneration into an attack on the opinion below as an erroneous statement of Arizona common law. (Petition at 17 et seq.). But the Supreme Court does not review matters of state law for error. The federal courts apply state law as decided by state courts and legislatures except in matters governed by the Federal Constitution or acts of Congress; there is no federal general common law which overrides state law. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

Petitioner's attack on state law in this Court is totally misdirected, and his attempt to rephrase the state law issue as a federal one is obviously contrived.

Petitioner's citation of this Court's decision in Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter-House &

Live-Stock Co., 120 U.S. 141 (1887), fails to support his due process contention. Although this pre-Erie case touches upon the law governing malicious prosecution actions, it does not attempt to decide that a federal common law rule^{2/} or that a right created by federal law governs such actions. Instead, the sole question presented was whether a state court had given proper effect to a federal court decision by allowing damages for malicious prosecution against a party who had been successful in the federal trial court. The Court expressly held that this narrow question arose under the Federal

^{2/}Even if it did declare federal common law, the declaration would no longer be binding in the post-Erie federal system.

Constitution and laws, and was not a question of state law or federal common law. 120 U.S. at 146.

Petitioner's asserted due process violation thus lacks authoritative support as a federal issue, and is in fact a state law issue contorted into a federal disguise. Moreover, the due process contention is devoid of analytical weight. Petitioner claims that he has a "substantive due process" right. (Petition at 16). Does he contend that the Federal Constitution allows him to assert a state tort claim in state court without complying with state tort law? Nothing in the Constitution requires that the federal structure of our national legal system be so upset.

Petitioner has not contended that Arizona's common law of malicious prosecution lacks a rational basis. In

fact, the rationale for the state law rule challenged by petitioner was explained by the Arizona Court of Appeals in its decision below:

The rationale for disallowing termination pursuant to settlement as a "favorable termination" for purposes of a malicious prosecution action has been stated as follows:

A dismissal resulting from negotiations, settlement, or consent is generally not deemed a favorable termination of the proceedings In such a case the dismissal reflects ambiguously on the merits of the action as it results from the joint action of the parties, thus leaving open the question of defendant's guilt or innocence.

Minasian v. Sapse, 80 Cal. App. 3d 823, 827, 145 Cal. Rptr. 829, 832 n. 4 (1978).

The reason for this rule is that where the termination of the case is brought about by a compromise or settlement between the parties, understandingly entered into, it is such an admission that there was probable cause that the plaintiff cannot afterwards retract it and try

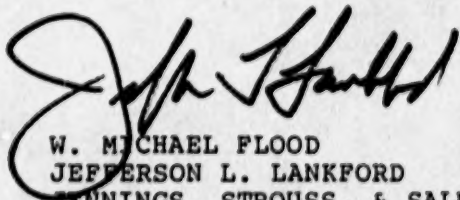
the question, which by settling he waived.

Tower Special Facilities, Inc. v. Investment Club, 104 Wis. 2d at 228, 311 N.W.2d at 229 (quoting Lechner v. Ebenreiter, 235 Wis. 244, 252, 292 N.W. 913, 916-917 (1940)).
(Petitioner's Appendix at 5a-6a).

Haas also was represented by counsel when he entered into the agreement in the fraud action which precluded a later malicious prosecution action. He has never produced evidence that counsel failed to fully inform him of the consequences of his decision. He voluntarily and knowledgeably entered into an agreement which necessarily led to the result of which he now complains. Petitioner's assertion of a denial of due process is no more than that: an assertion not grounded in either law or fact.

CONCLUSION

Because jurisdiction is lacking in this case for want of a properly presented federal question, and in the alternative because the federal question presented is insubstantial, respondents Edgar Hash and Elaine Hash respectfully request that the Court dismiss or deny the petition for a writ of certiorari to the Arizona Court of Appeals.



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FILED

FEB 17 1983

ALEXANDER L. STEVAS,
CLERK

NO. 82-1125

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JONATHAN L. HAAS,
Petitioner,
v.
EDGAR HASH and ELAINE HASH,
Respondents.

Reply to Response to Petition for a Writ
of Certiorari to the Court of Appeals of
Arizona

Jonathan L. Haas
In Propria Persona
P.O.Box 7461
Phoenix, Arizona 85011
602-277-6001

QUESTIONS PRESENTED

1. Whether Federal questions were raised in the State courts?

2. Whether substantial questions of deprivation of Constitutional rights were raised by Petitioner in the State courts?

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NO. 82-1125

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JONATHAN L. HAAS,
Petitioner,
v.
EDGAR HASH and ELAINE HASH,
Respondents.

Reply to Response to Petition for a Writ
of Certiorari to the Court of Appeals of
Arizona

Petitioner, Jonathan L. Haas, prays
that a Writ of Certiorari issue to review
the judgment of the Court of Appeals of the
State of Arizona entered in this matter on
July 27, 1982.

OPINION BELOW

The Opinion of the Court of Appeals of the State of Arizona, and the judgment of the Superior Court of the State of Arizona in and for the County of Maricopa are reproduced in the Appendix to the Petition.

REASONS FOR GRANTING THE WRIT

The Arizona Court of Appeals' decision denied Haas of due process of law. Their holding that the procedural requirement of a "favorable termination" rather than a "final termination" should not be allowed to interfere with HAAS's right to substantive due process. The holding by the Arizona Court of Appeals that any civil action terminated pursuant to negotiations, agreement and stipulation, even to such collateral matters as attorney fees, which have no relation to the merits of the case, does not constitute a favorable termination

as is necessary for maintenance of an action for malicious prosecution deprives the victim/defendant in a malicious and unfounded civil action of any recourse unless he is able to protract the judicial process to a full hearing on the merits. This requirement of protracted litigation resulting in a decision on the merits raises substantial questions of due process requiring plenary consideration.

The refusal by the trial court and the Court of Appeals to recognize that the malicious and unfounded civil action complained of was an out and out fraud and that the Corrected Corrected Judgment was procured by collateral fraud was a travesty of justice and must be reformed.

I. Federal Questions Were Raised
in the State Courts.

Respondents HASH argue that this Court lacks jurisdiction under 28 U.S.C. 1257(3) to review the final judgment rendered by

the Arizona Court of Appeals because no federal questions were raised in the State courts. Section 1257(3) establishes this Court's jurisdiction, in part, "...where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution..." and "...where any...right, privilege... is specially set up or claimed under the Constitution...of...the United States."

In support of their argument HASH cites Cardinale v. Louisiana 394 U.S. 437 (1969); F.G.Oxley Stave Co. v. Butler County 166 U.S. 648 (1897); and Beck v. Washington 369 U.S. 541 (1962), misinterpreting them to require the federal questions presented in the Petition for Writ of Certiorari to have been presented in the same words in the State courts. Cardinale, the most recent of these cases, refers to "...the petitioner's admitted

failure to raise the issue he presents here in any way below...". 394 U.S. at 439.

The federal questions of denial of due process and repugnancy to the Constitution were raised in the State courts and delineated on pages 13 and 14 of the Petition.^{1/}

Hash argues that this Court "cannot review [a] final judgment, even if it denied some title, right, privilege or immunity...unless...[it] was 'specially set up and claimed' in the state court..." citing Oxley, 166 U.S. at 653. Oxley was decided by this Court in 1897, however this matter was thoroughly discussed in Green Bay & Mississippi Canal Company v. Patten Paper Company 172 U.S. 58 (1898).

1. See Petitioner/Plaintiff Haas's Response to Motion for Summary Judgment, page 2, lines 5-9, filed in the trial court and Petitioner/Appellant Haas's Motion for Rehearing, page 10, lines 14-23, filed in the appellant court (App. 36a-37a of Petition).

"But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of the court.

'The true and rational rule,' this court said in **Bridge Proprietors v. Hoboken Co.**, 1 Wall 116, 143,, 'is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' In **Roby v. Colchour**, 146 U.S. 153, 159, it was said 'our jurisdiction being invoked, upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment.' 'If it appears from the record by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient.' **Powell v. Brunswick County**, 150 U.S. 433, 440: **Sayward v. Denney**, 158 U.S. 180; **Chicago, Burlington & c. v. Chicago**, 166 U.S. 226". 172 U.S. at 67.

Although these Constitutional issues were raised and argued in both the state trial court and the state appellant courts,

these state courts did not choose to directly confront the issues. Their reason for avoiding the issues may well have been as argued by HAAS in his Motion for Rehearing.

"The Third Party Complaint filed by Hash, as counsel, in the underlying malicious action was an out and out fraud. The games played by the trial judge and Hash in concocting an unfavorable termination of the underlying malicious action was a travesty of justice. Even the appellate court has shielded this incompetent attorney Hash. If the Courts will not protect the people from incompetent and dishonest attorneys, then to whom shall the people turn?" (App. 36a-37a of Petition).

II. Substantial Questions of
Deprivation of Constitutional
Rights were Raised by Petitioner.

HASH argues that the Constitutional questions raised concern insubstantial claims. Obviously HASH views the denial of due process involved here in a different light than HAAS.

The questions raised by HAAS relate to an attorney utilizing collateral fraud to avoid civil prosecution for filing an

unfounded civil action to cover up his own incompetence or negligence. The petitioner/victim's recourse to recover damages sustained due to this unfounded and malicious civil action rests upon the state court's upholding the Constitutional rights of the victim to due process. The judgment in the underlying unfounded and malicious action was reformed in an attempt to change a favorable termination into a final, but unfavorable termination, in a mickey mouse attempt to thwart justice.

As to jurisdiction under Rule 17, Supreme Court Rules, paragraph 1.(b). relates to conflicting decisions of state courts of last resort on federal questions. California requires a final termination of an unfounded malicious civil action.

Minasian v. Sapse 145 Cal.Rptr. 829, 80 Cal.App.3d 823 (1978); Jaffe v. Stone 18 Cal.2d 146, 114 P.2d 335 (1941); Hurgren

v. Union Mutual Life Insurance Company
141 Cal. 585, 75 P. 168 (1904); Hudson v. Zumwalt 64 Cal.App.2d 866, 149 P.2d 457 (1944). The Arizona Court of Appeals requires a favorable termination (App. 5a to Petition) citing Weaver v. Superior Court, 95 Cal.App.3d 166, 156 Cal.Rptr. 745 (1979); Cline v. Flagler Sales Corp., 207 So.2d 709 (Fla.App. 1968); Executive Commercial Services, Ltd. v. Dasalakis, 74 Ill.App.3d 760, 393 N.E.2d 1365 (1979); Miller v. Jamaica Savings Bank, 50 A.D.2d 865, 377 N.Y.S.2d 89 (1975); Tower Special Facilities, Inc. v. Investment Club, Inc., 104 Wis.2d 221, 311 N.W.2d 225 (App. 1981); as well as two authorities.(App. 5a to Petition). The Arizona Court of Appeals miscites Wong v. Tabor 442 N.E.2d 1279 (Ind.App. 1981) as requiring a favorable termination also. This conflict of state court decisions was used by the Arizona

Court of Appeals as an excuse to cover up HASH's actions and deny HAAS due process of law.

It is interesting to note that the Arizona Court of Appeals held this was a question of first impression in Arizona (App. 5a to Petition) and then issued a Memorandum Decision (App. 1a to Petition).^{2/} In effect the Arizona Court of Appeals abrogated their sworn duty to impartiality and distorted the common law in Arizona to shield an errant attorney from answering for his actions. It then said this law is not applicable to anyone else. The Arizona Court of Appeals created a personal common law ruling solely to deny HAAS of his rights to redress in the state courts. This was a

2. The denomination of a decision as Memorandum does not affect this Court's jurisdiction. See Andrus v. Idaho 445 U.S. 715, 63 L.Ed.2d 739 (1980).

deliberate and intentional denial of
Petitioner HAAS's Constitutional rights
to due process of law and is repugnant to
the Constitution of the United States.

CONCLUSION

The federal questions were presented
in both the state trial court and the state
appellate courts and were substantial
questions of deprivation of Constitutional
rights. In its opinion, the Arizona Court
of Appeals made several determinations
which, taken singly or together, deprived
Petitioner of Constitutional due process
as guaranteed by the Fourteenth Amendment
and as interpreted in decisions of this
Court.

For these reasons, a Writ of Certiorari
should be granted.

Respectfully submitted,

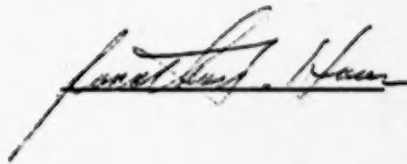
Jonathan L. Haas
Jonathan L. Haas
Petitioner

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602-277-6001

Date: February 16, 1983

CERTIFICATE OF SERVICE

This is to certify that three copies of this Reply have been served on all parties required to be served, i.e., on Respondent by placing same in an envelope and depositing it in the United States mail, with first class postage prepaid, addressed to counsel of record as follows: Jefferson L. Lankford, Esq., Jennings, Strouss & Salmon, 111 West Monroe, Phoenix, Arizona 85003, on this 16th day of February, 1983.

A handwritten signature in cursive script, appearing to read "Janet L. Lankford", is written over a horizontal line.